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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92063567
Party	Defendant Spy Phone Labs LLC
Correspondence Address	SPY PHONE LABS LLC 1465 ROUTE 23 SOUTH #139 WAYNE, NJ 07470 UNITED STATES
Submission	Motion to Suspend for Civil Action
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Attachments	Suspend and Extend.pdf(446489 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Registration No. 3,948,486

Mark: SPY PHONE

Issued April 19, 2011

-----X
GOOGLE INC.,

Petitioner,

Cancellation No. 92063567

v.

SPY PHONE LABS LLC,

Registrant.
-----X

**MOTION TO SUSPEND PROCEEDING AND TO EXTEND
REGISTRANT'S TIME TO RESPOND TO THE PETITION**

Registrant Spy Phone Labs LLC ("Spy Phone Labs"), by its undersigned counsel, hereby moves the Board, pursuant to Trademark Rule of Practice § 2.117(a) and 37 C.F.R. § 2.117(a), for a suspension of this proceeding and an extension of Spy Phone Labs' time to answer or move against the petition for cancellation until 20 days after the suspension is lifted. In support of its motion, Spy Phone Labs states as follows:

1. The parties to this proceeding are also parties to an action pending in the U.S. District Court for the Northern District of California entitled Spy Phone Labs LLC v. Google, Inc. et al., Case. No .5:15-CV-03756-PSG (the "Infringement Action"). (A copy of the second amended complaint filed in the Infringement Action (the most recent version of Spy Phone Labs' pleading) is attached hereto as Exhibit A.)

2. Spy Phone Labs is both the registrant in this proceeding and the plaintiff in the Infringement Action. Petitioner Google, Inc. (“Google”) is the petitioner in this proceeding and a defendant in the Infringement Action.

3. In the Infringement Action, Spy Phone Labs has asserted claims against Google for, *inter alia*, contributory trademark infringement of Spy Phone Labs’ federally registered trademark SPY PHONE, Registration No. 3,948,486 (the “Mark”), which is the same trademark at issue in this cancellation proceeding.

4. In this proceeding, Google has alleged, *inter alia*, that registration of the Mark should be canceled because the Mark is generic or merely descriptive. (See Docket # 1 at ¶¶ 27-34.) Google has also alleged that the registration of the Mark is void *ab initio* because the entity identified as the registrant of the Mark in the registration certificate did not exist at the time of the original application was filed. (*Id.* at ¶¶ 35-40.)

5. Both of these grounds raised in this proceeding are likely to be raised as defenses by Google in the Infringement Action.

6. For example, as a defense to the Infringement Action, Google will likely seek to rely on the so-called “fair-use” defense, which precludes a trademark registrant to appropriate a descriptive term for its exclusive use and so prevent others from accurately describing a characteristic of their goods. Pinterest, Inc. v. Pintrips, Inc., 140 F. Supp. 3d 997 (N.D. Cal. 2015) (citing New Kids on the Block v. News Am. Pub., Inc., 971 F.2d 302, 306 (9th Cir.1992)).

7. In fact, although Google has not yet filed an answer in the Infringement Action, motion papers previously filed by Google include statements demonstrating that Google clearly intends to assert that the Mark is generic or merely descriptive in defending the Infringement Action. (See page 8, n.6 of Google’s renewed notice of motion to dismiss the amended complaint,

attached hereto as Exhibit B, in which Google seeks to defend its conduct in responding to an infringement complaint by describing the Mark as merely a “descriptor.”)

8. Google is also likely to raise the issue that the application for the Mark was void *ab initio*, and that Spy Phone Labs does not own the Mark, as a defense in the Infringement Action, since it is well-settled that “ownership of a protectable mark” is a required element of a claim for trademark infringement. English & Sons, Inc. v. Straw Hat Restaurants, Inc., No. 15-CV-01382-LB, 2016 WL 1305946, at *12 (N.D. Cal. Apr. 1, 2016) (citing ProtectMarriage.com v. Courage Campaign, 680 F. Supp. 2d 1225, 1228 (E.D. Cal. 2010); see also 15 U.S.C. § 1125.

9. Google, in fact, has already alluded to challenging Spy Phone Labs’ ownership of the Mark as a possible defense in the Infringement Action. (See page 1, n.2 of Google’s renewed notice of motion to dismiss the amended complaint, attached hereto as Exhibit B.)

10. Accordingly, suspension of this proceeding is warranted because the disposition of the Infringement Action may have a bearing on the issues that will also be before the Board in this cancellation proceeding, which involves the same parties and the same trademark. New Orleans Louisiana Saints LLC & NFL Properties LLC, 99 U.S.P.Q.2d 1550 (TTAB Jul. 22, 2011) (“the civil action does not have to be dispositive of the Board proceeding to warrant suspension, it need only have a bearing on the issues before the Board”).

11. Suspension of this proceeding will also be beneficial because it will provide the Patent and Trademark Office sufficient time to act on Spy Phone Labs’ pending application to correct the mistaken identity of the original owner of the Mark on the Registration Certificate by issuing a certificate of correction or a new registration certificate pursuant to Lanham Act § 7(h), 15 U.S.C. § 1057(h).

12. Further, suspension of this proceeding, including an extension of Spy Phone Labs' time to respond to the petition, will promote judicial efficiency and save time, effort and expense for the Board and the parties due to the similarity in the questions of law and fact raised in both the Action and the proceedings.

WHEREFORE, Spy Phone Labs, having shown good cause, requests that the Board suspend this proceeding pending the termination of the Infringement Action and extend Spy Phone Labs' time to answer of move against the petition for a period of 20 days from the date the suspension is lifted and the proceeding is resumed.

Dated: New York, New York
May 27, 2016

GREENBERG FREEMAN LLP

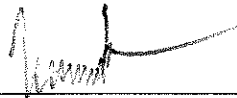
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO SUSPEND PROCEEDING AND TO EXTEND REGISTRANT'S TIME TO RESPOND TO THE PETITION, together with the attached Exhibits A-B, was served via first-class mail, postage prepaid the 27th day of May 2016 upon the following:

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A handwritten signature in black ink, appearing to read 'Michael A. Freeman', is written over a horizontal line.

Michael A. Freeman

Dated: May 27, 2016

EXHIBIT A

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SPY PHONE LABS LLC,

Plaintiff,

v.

GOOGLE INC., ANDREI CIUCA, d/b/a
CAD DESIGN, and JOHN DOES 1-49,

Defendants.

Case No.: 5:15-CV-03756-PSG

Honorable Paul Singh Grewal

SECOND AMENDED COMPLAINT

DEMAND FOR JURY TRIAL

1 Plaintiff Spy Phone Labs LLC (“Plaintiff”), by its undersigned attorneys, for its second
2 amended complaint in this action against defendants Google, Inc. (“Google”), Andrei Ciuca
3 (“Ciuca”), d/b/a Cad Design, and John Does 1-49 (the “Doe Defendants”), alleges as follows:

4 INTRODUCTION

5 1. This action asserts claims under the Lanham Act arising from infringement
6 and dilution by Ciuca and the Doe Defendants of Plaintiff’s federally registered trademark SPY
7 PHONE® and Google’s contribution to such infringement by knowingly and intentionally allowing
8 others to infringe on and dilute Plaintiff’s trademark in an online marketplace operated and controlled
9 by Google.

10 2. This action also asserts common law claims against all defendants for tortious
11 interference with contract and for tortious interference with Plaintiff’s prospective economic
12 advantage arising from defendants’ intentional, unfair and unlawful acts intended to harm Plaintiff’s
13 business relationships by, among other things, the submission of false complaints about Plaintiff and
14 its product, Plaintiff’s unjustified suspension from Google’s online marketplace in retaliation for
15 Plaintiff having submitted legitimate complaints against other developers, and Google’s refusal to
16 allow Plaintiff to use its federally registered trademark to identify its product anywhere in the world
17 while allowing other developers to use Plaintiff’s trademark in countries where the mark is not
18 registered.

19 3. Finally, this action assert claims against Google for breach of the implied
20 covenant of good faith and fair dealing in the parties’ agreement and violations of Cal. Bus. and Prof.
21 Code §§ 17200 *et seq* (also known as the California Unfair Competition Law or “UCL”) arising from
22 Google’s abuse of the discretion afforded to it under the parties’ agreement, which result in Plaintiff’s
23 product being removed by Google from Google’s online marketplace without any justification.

24 PARTIES

25 4. Plaintiff Spy Phone Labs LLC is a New Jersey limited liability company with
26 its principal place of business in Wayne, New Jersey.

27 5. Upon information and belief, defendant Google, Inc. is a Delaware
28 corporation with its principal place of business in Mountain View, California.

6. Upon information and belief, Ciuca, doing business as Cad Design, is a citizen of Bucharest, Romania.

7. Upon information and belief, the Doe Defendants are developers of software applications used for mobile phones who have infringed upon Plaintiff's federally registered trademark and/or taken action intended to interfere with Plaintiff's existing contracts and prospective business relations. Plaintiff does not know the true names or legal capacities of the Doe Defendants, and therefore sues these defendants under fictitious names until such time as they can be identified through discovery from Google.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 insofar as this action asserts claims arising under federal law, namely the Lanham Act. This Court has supplemental jurisdiction over state and common law claims pursuant to 28 U.S.C. § 1367.

9. This Court has personal jurisdiction over all defendants in this action because each either does business in the State of California and/or has sufficient minimum contacts with the State of California such that maintaining this action in this Court will not offend traditional notions of fair play and substantial justice.

10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this judicial district. Intradistrict assignment has already been determined in this transferred case.

FACTS ALLEGED

Google and Google Play

11. Rather than simply provide telephone service, today’s mobile “smart” phones offer many features and can perform numerous functions. Some of these functions and features are installed on the phone by the manufacturer, but many more can be added by the consumer based on his or her needs and interests.

12. Functions and features can be added to a smart phone by installing or downloading a software application, more commonly known as an “app.”

1 13. Google owns and operates Google Play (or the “Store” or the “Market”), an
2 app distribution platform and online marketplace for smart phones and other electronic devices that
3 operate on the Android® operating system, the operating system installed on over 60% of all mobile
4 devices in use today.

5 14. Google Play enables owners and users of smart phones that operate on the
6 Android® operating system to download apps as well as other electronic media onto their phones.

7 15. Google Play also enables a consumer who downloads an app to post a rating
8 of one to five stars and to provide specific comments about his or her experience using the app.

9 16. Upon information and belief, more than 90% of all Android®-based apps that
10 are downloaded onto a mobile phone are downloaded through Google Play, making Google Play, far
11 and away, the most dominant and important marketplace for any developer of Android®-based apps.

12 17. The easiest and most common way for consumers to locate an app on Google
13 Play is by entering one or more words into Google Play’s search field, which, using an algorithm
14 developed and applied by Google, will generate a list that ranks the located apps in order of relevance.

15 18. Upon information and belief, the name (or title) and description of an app are
16 significant factors in determining the ranking of each app in response to a search for a specific word
17 or phrase.

18 19. Upon information and belief, the number and quality of consumer reviews that
19 are posted on Google Play are also significant factors in determining the ranking of each app in
20 response to a specific search for a word or phrase.

21 20. Apps that rank higher on the list for a particular search word or phrase are
22 more likely to be downloaded than lower ranking apps because these are the first apps that consumers
23 see and are likely the most relevant for the consumer.

24 21. An app developer who wishes to offer an app for download on Google Play is
25 required by Google to agree to abide by the terms and conditions mandated by Google, which are
26 incorporated into Google Play’s Developer Distribution Agreement (“DDA”). (A copy of the DDA
27 in effect as of August 2012, when first agreed to by Plaintiff, is attached hereto as Exhibit 1.)
28

22. Section 4 of the DDA describes the terms and conditions governing a developer's use of Google Play and includes, among other things, a prohibition against a developer from offering a product that: (a) interferes with, disrupts, damages or accesses in an unauthorized manner the device of any third party; and (b) does not adhere to any of Google Play's "Developer Program Policies."

23. Google Play's Developer Program Policies currently include or have included, among others, rules and policies that prohibits a developer from offering an app on Google Play that: (a) constitutes "spyware" because it collects information (such as the user's location or behavior) without the user's knowledge or consent; (b) impersonates other entities, brands, or otherwise infringes on intellectual property rights of others, including trademark and other proprietary rights; (c) "spams" users or the Store; and (d) offers the same function or service under different names.

24. In or about March 2016, Google Play added a new Developer Program Policy specifically applicable to apps that monitor or track a user's behavior and activity on a device, which requires that such apps: (a) must not present themselves as a spying or secret surveillance solution; (b) must not hide or cloak tracking behavior or attempt to mislead users about such functionality; (c) present users with a persistent notification and unique icon that clearly identifies the app on the device; and (d) do not provide any means to activate or access functionality that violate these terms (collectively, the "March 2016 Monitoring App Requirements").

25. Section 7.2 of the DDA provides for "takedowns" of apps by Google from Google Play if Google determines "in its sole discretion" that an app or other product offered by a developer violates, among other things, applicable law, the terms of the DDA or any of Google Play's Developer Program Policies.

26. At the time Plaintiff agreed to the terms of the DDA, § 7.2 of the DDA provided as follows:

Google Takedowns. While Google does not undertake an obligation to monitor the Products or their content, if Google is notified by you or otherwise becomes aware and determines in its sole discretion that a Product or any portion thereof or your Brand Features; (a) violates the intellectual property rights or any other rights of any third party; (b) violates any applicable law or is subject to an injunction; (c) is pornographic, obscene or otherwise violates Google's hosting policies or other terms of service as may be updated by Google from time to time in its sole discretion; (d) is being distributed by you improperly; (e) may create liability for Google or Authorized

Carriers; (f) is deemed by Google to have a virus or is deemed to be malware, spyware or have an adverse impact on Google's or an Authorized Carrier's network; (g) violates the terms of this Agreement or the Developer Program Policies for Developers; or (h) the display of the Product is impacting the integrity of Google servers (i.e., users are unable to access such content or otherwise experience difficulty), Google may remove the Product from the Market or reclassify the Product at its sole discretion. Google reserves the right to suspend and/or bar any Developer from the Market at its sole discretion.

Google enters into distribution agreements with device manufacturers and Authorized Carriers to place the Market software client application for the Market on Devices. These distribution agreements may require the involuntary removal of Products in violation of the Device manufacturer's or Authorized Carrier's terms of service.

In the event that your Product is involuntarily removed because it is defective, malicious, infringes intellectual property rights of another person, defames, violates a third party's right of publicity or privacy, or does not comply with applicable law, and an end user purchased such Product within a year before the date of takedown,: (i) you must refund to Google, all amounts received, plus any associated fees (i.e. chargebacks and payment transaction fees), and (ii) Google may, at its sole discretion, withhold from your future sales the amount in subsection (i) above.

(Exhibit 1, ¶ 7.2)

27. In the current version of the DDA, which was most recently updated in May 2015, § 7.2 of the DDA currently provides as follows (underlines and strikethroughs show changes):

Google Takedowns. While Google does not undertake an obligation to monitor the Products or their content, if Google is notified by you or otherwise becomes aware and determines in its sole discretion that a Product or any portion thereof or your Brand Features; (a) violates the intellectual property rights or any other rights of any third party; (b) violates any applicable law or is subject to an injunction; (c) is pornographic, obscene or otherwise violates Google's hosting policies or other terms of service as may be updated by Google from time to time in its sole discretion; (d) is being distributed by you improperly; (e) may create liability for Google or Authorized Carriers; (f) is deemed by Google to have a virus or is deemed to be malware, spyware or have an adverse impact on Google's or an Authorized Carrier's network; (g) violates the terms of this Agreement or the Developer Program Policies for Developers; or (h) the display of the Product is impacting the integrity of Google servers (i.e., users are unable to access such content or otherwise experience difficulty), Google may remove the Product from the MarketStore or reclassify the Product at its sole discretion. Google reserves the right to suspend and/or bar any Developer from the MarketStore at its sole discretion. If your Product contains elements that 7.2 could cause serious harm to user devices or data, Google may at its discretion disable the Product or remove it from devices on which it has been installed. Google may suspend or terminate distribution of your Products if you materially breach the terms of any non-disclosure agreement or other agreement relating to the Store or the Android platform.

Google enters into distribution agreements with device manufacturers and Authorized Carriers to place the MarketStore software client application for the MarketStore on Devices. These distribution agreements may require the involuntary removal of

1 Products in violation of the Device manufacturer's or Authorized Carrier's terms of
2 service.

3 In the event that your Product is involuntarily removed because it is defective,
4 malicious, infringes intellectual property rights of another person, defames, violates a
5 third party's right of publicity or privacy, or does not comply with applicable law, and
6 an end user purchased such Product within a year before the date of takedown,: (i)
you must refund to Google, all amounts received, plus any associated fees (i.e.
chargebacks and payment transaction fees), and (ii) Google may, at its sole discretion,
withhold from your future sales the amount in subsection (i) above.

7 28. While the DDA provides that Google “does not undertake an obligation to
8 monitor” the products and apps offered by a developer on Google Play or the content of such products
9 and apps, Google does, in fact, regularly and routinely conduct independent monitoring of the apps
10 listed on Google Play to ensure compliance with the DDA and Google Play’s Developer Program
11 Policies.

12 29. This monitoring and investigation of apps is performed by a group of Google
13 employees known as the “Google Play Team.”

14 30. In addition, since at least January 2015, the monitoring and investigation by
15 the Google Play Team includes “human reviews” of each new app to ensure compliance with Google
16 Play’s Developer Program Policies before the app is listed in the Store.

17 31. In addition to independently monitoring apps listed in Google Play, the
18 Google Play Team investigates specific complaints lodged against a particularly app or developer.

19 32. The Google Play Team also determines what action, if any, should be taken in
20 response to a complaint about an app or developer.

21 33. Before an app can be listed on Google Play, the developer must incorporate
22 source code provided by Google that enables the apps to access and interact with a phone’s Android®
23 operating system.

24 34. In this respect, Google provide a portion of the content for all apps listed on
25 Google Play.

26 35. When an app is listed on Google Play, it is available to all consumers in all
27 countries throughout the world with access to the Internet unless the developer expressly restricts the
28 availability of the app to certain countries.

1 36. Currently, approximately 86.5% of all apps classified by Google as “tools” –
2 which is the category in which the app that is the subject matter of this action belongs – are
3 downloaded by consumers located outside of the U.S., while the remaining 13.5% of tool apps are
4 downloaded by consumers located within the U.S.

5 Plaintiff’s Trademark, Domain Name and App

6 37. Plaintiff is the owner of the registered U.S. trademark SPY PHONE®,
7 Registration Number 3948486, for computer application software for mobile phones in International
8 Class 09, first used in commerce on September 1, 2010.

9 38. After July 2013, Plaintiff’s SPY PHONE® trademark was also registered in
10 Turkey, Mexico, South Korea and Australia under International Registration Number 1169007.

11 39. Plaintiff sought to register its trademark in other countries, including those
12 included within the European Union, but those registrations were denied.

13 40. Plaintiff also owns the domain name <spyphone.com>.

14 41. Plaintiff is the developer of an app that can be downloaded on a mobile phone
15 that operates on the Android® operating system (“Plaintiff’s App”).

16 42. Plaintiff’s App is what it commonly known as a “monitoring app.”

17 43. When downloaded on a mobile phone, Plaintiff’s App allows the user or an
18 authorized third party to monitor or track a user’s behavior and activity, including the location of the
19 phone through GPS tracking, the telephone number of the sender or recipient of incoming and
20 outgoing messages, the content of messages and Internet usage.

21 44. Monitoring apps such as Plaintiff’s App are particularly useful on phones used
22 by minors because it allows the minor’s parent or guardian to track the child’s activities and location.

23 45. The information obtained from a mobile phone by Plaintiff’s App is
24 transmitted from the mobile phone to a secure server maintained by Plaintiff, and can be accessed
25 only through a private account established via a website operated by Plaintiff that is associated with
26 Plaintiff’s domain name <spyphone.com>.

27 46. To ensure compliance with Google’s Play’s anti-spam policy, the data
28 obtained from a mobile phone is not sent to any other device and can only be viewed through the

1 private account on Plaintiff's secure server established by the person who downloaded Plaintiff's
2 App on the mobile device.

3 47. To ensure compliance with Google's anti-spyware policy and protect against
4 Plaintiff's App being misused by someone attempting to obtain information from a mobile device
5 without the owner's knowledge, Plaintiff's App causes a unique icon to periodically appear on the
6 mobile device on which Plaintiff's App is downloaded, which notifies the user that Plaintiff's App
7 has been installed on that mobile device.

8 48. Although the specific requirements contained in the March 2016 Monitoring
9 App Requirements were not promulgated by Google until just recently, Plaintiff's App has complied
10 with all of the March 2016 Monitoring App Requirements since at least June 2013.

11 49. Plaintiff's App is free to download, but generates revenue through advertise-
12 ments placed on the website associated with <spyphone.com> through a program operated by Google
13 known as Adsense®.

14 50. Google's Adsense® program enables website owners, such as Plaintiff, to
15 earn revenue from advertisers who bid for the right to place advertisements on a website through an
16 auction process operated by Google. The advertiser with the highest bid earns the right to post an
17 advertisement on the website.

18 51. Since the amount that an advertiser is willing to pay is driven primarily by the
19 number of people who may potentially view an advertisement, the amount of advertising revenue
20 earned under Google's Adsense® program is determined primarily by the amount of traffic that is
21 driven to a particular website.

22 52. Thus, in the case of the website associated with Plaintiff's <spyphone.com>
23 domain name, the more people who download Plaintiff's App, the more people who will need to visit
24 Plaintiff's website to view the information sent to their private accounts, and the more money
25 advertisers will pay to advertise on Plaintiff's website, which means more revenue generated by from
26 Plaintiff's App.

27 ///

28 ///

1 53. From April 2013 through December 2015, during which time Plaintiff
2 maintained two paid advertisements on its website, Plaintiff earned an average of 45¢ in revenue
3 through the AdSense® program for each download of Plaintiff's App on Google Play.

4 54. From December 2015 to date, during which time Defendant has maintained
5 only one paid advertisement on its website, Plaintiff earned an average of 22.5¢ in revenue through
6 the AdSense® program for each download of Plaintiff's App on Google Play.

7 55. At all relevant times herein, all defendants had knowledge of Plaintiff's
8 participation in Google's AdSense® program.

9 56. Upon information and belief, Google operates the AdSense® program through
10 a business unit that is separate and independent from the business unit responsible for Google Play
11 and that employs the Google Play Team.

12
13 Plaintiff's App Is Listed on Google Play Under the SPY PHONE® Brand Name

14 57. In or around August 2012, Plaintiff established a developer account for
15 Google Play.

16 58. As part of establishing its developer account, Plaintiff and Google agreed to
17 be bound by the terms of the DDA, which is a valid and binding agreement between Plaintiff and
18 Google.

19 59. At the time Plaintiff established its developer account and at all relevant times
20 since then, there have been dozens of monitoring apps created by different developers listed for
21 download on Google Play that perform the same or similar functions as Plaintiff's App.

22 60. After establishing its developer account, Plaintiff initially listed Plaintiff's
23 App for download under the name "SPY PHONE® Phone Tracker," which corresponded with
24 Plaintiff's federally registered trademark.

25 61. By obtaining a trademark registration for the name SPY PHONE®, Plaintiff
26 sought to identify distinguish its monitoring app from similar apps offered by other developers, while
27 preventing other developers from copying or infringing upon its trademarked name, which Plaintiff
28 expected would provide Plaintiff's App with a competitive advantage over other monitoring apps.

1 At its peak about 8000 apps a day were downloaded under the Spy Phone® trademark, making it
2 believed to be based upon public reporting one of the highest downloaded tools apps worldwide in
3 the Google Play store

4 62. Between August 2012 and June 2013, Plaintiff's App, under the brand SPY
5 PHONE® was one of the most popular apps downloaded from Google Play, with over 1.1 million
6 downloads.

7 63. The popularity of Plaintiff's App on Google Play resulted in increased traffic
8 at Plaintiff's <spyphone.com> website, which elevated the price that advertisers were willing to pay
9 to advertise on Plaintiff's website, and which, in turn, together with the added traffic, increased
10 Plaintiff's advertising revenues.

11
12 Plaintiff's Attempts To Enforce Its Trademark Rights

13 64. If the holder of a registered trademark discovers that an app or other product
14 listed on Google Play is infringing on its trademark, under Google's policies, the trademark holder
15 can submit an online complaint to the Google Play Team requesting that the infringing app be
16 removed from the Store for violating the trademark infringement policy contained in Google Play's
17 Developer Program Policies.

18 65. Upon receipt of a trademark infringement complaint, under Google's policies,
19 one or more members of the Google Play Team will review it and, if determined to be valid, the
20 Google Play Team will take down the infringing app from the Store, but only in the countries where
21 the trademark is registered.

22 66. Thus, for example, if, in response to a trademark complaint, the Google Play
23 Team takes down an app that infringes upon a U.S. trademark, consumers in the U.S. will be not be
24 able to view or download the infringing app from the version of Google Play available in the U.S.
25 ("Google Play U.S."), but consumers outside of the U.S. (who are responsible for downloading over
26 86% of all the tool apps downloaded from Google Play) will still be able to view and download the
27 infringing app.

1 67. Upon removal of an infringing app from the Store in response to a complaint
2 from a trademark holder, the Google Play Team sends a notice to the developer of the infringing app
3 stating, among other things, why its app has been removed from Google Play, together with the
4 identity of the trademark that has been infringed and the name and email address of the person or
5 party who filed the infringement complaint.

6 68. Starting in or around November 2012, Plaintiff discovered that other
7 developers, including some of the Doe Defendants, were attempting to trade on the success and
8 reputation of Plaintiff's App by offering apps for download on Google Play under names that copied
9 or incorporated Plaintiff's registered SPY PHONE® trademark and that performed the same or
10 similar functions as Plaintiff's App.

11 69. In response to the other developers' infringement upon its SPY PHONE®
12 trademark on Google Play, Plaintiff submitted trademark infringement complaints against these
13 developers to the Google Play Team using Google Play's online complaint form.

14 70. Upon information and belief, the same employee or small group of employees
15 on the Google Play Team were responsible for handling all of the trademark infringement complaints
16 relating to Plaintiff's Spy Phone® trademark and/or monitoring apps and, therefore, Google was
17 specifically aware of all Plaintiff's efforts to enforce its trademark rights.

18 71. From approximately November 2012 through May 2013, in response to
19 Plaintiff's trademark complaints, Google removed apps listed on Google Play U.S. under names that
20 either copied Plaintiff's trademark verbatim, or incorporated Plaintiff's trademark in the name,
21 including: (a) "Galyum Spy Phone;" (b) "Spy Phone Camera"; and (c) "Spy Phone Android."

22 72. These takedowns were effective only with respect to Google Play U.S. In
23 other words, consumers outside the U.S. who could access Google Play were still able to view and
24 download the infringing apps.

25 73. In addition to removing the infringing app from the Store, § 7.2 of the DDA
26 also authorizes Google, in its sole discretion, to suspend and/or bar any developer from the Store
27 who violates any of the terms of the DDA or any of Google Play's Developer Program Policies.
28

1 74. Upon information and belief, none of the developers whose apps were
2 removed from the Store in response to Plaintiff's trademark infringement complaints in 2012 and
3 2013 were barred from Google Play or had their developer account suspended.

4
5 Without Warning, Google Removes Plaintiff's App From
6 Google Play and Terminates Its Developer Account Without Cause

7 75. In or around May 17, 2013, Plaintiff filed a complaint using Google's online
8 trademark infringement complaint form against a developer doing business under the name Cad
9 Design, which had listed a monitoring app on Google Play under the name "Spy Phone App."

10 76. Despite actual notice of direct infringement of Plaintiff's Spy Phone®
11 trademark on May 17, 2013, Google took no action to stop this infringement by Cad Design until on
12 or about June 13, 2013, 27 days later.

13 77. On or about June 13, 2013, the Google Play Team took down Cad Design's
14 infringing app from Google Play U.S. in response to Plaintiff's claim of trademark infringement.

15 78. Upon information and belief, the Google Play Team sent Cad Design a
16 takedown notice identifying Plaintiff as the complaining party.

17 79. On June 13, 2013, Plaintiff received an email from defendant Ciuca, who
18 identified himself as an app developer doing business on Google Play under the name Cad Design.

19 80. Ciuca's email complained that his monitoring app had been removed from
20 Google Play as a result of a complaint filed by Plaintiff and asked for an explanation.

21 81. Plaintiff responded by email that the name Ciuca was using for his app
22 infringed on Plaintiff's SPY PHONE® trademark, and that if Ciuca wanted to offer a monitoring app
23 to U.S. consumers on Google Play, he must do so under a name that does not infringe on Plaintiff's
24 SPY PHONE® trademark.

25 82. Almost immediately following this exchange of emails, Google started taking
26 actions to prevent Plaintiff from exercising and enforcing its trademark rights as well as other actions
27 that had an adverse effect on Plaintiff's business, as described further below.
28

1 83. Although Plaintiff did not realize it at the time, Plaintiff now believes that the
2 actions were orchestrated by Ciuca, members of the Google Play Team and possibly other Doe
3 Defendants acting in concert against Plaintiff as a result of the success of Plaintiff's App.

4 84. On or about June 24, 2013, Plaintiff submitted an online trademark complaint
5 form to Google against a developer who had listed a parental monitoring app on Google Play named
6 "Reptilicus.net Brutal Spy Phone."

7 85. Although the Google Play Team had previously taken down apps with
8 similarly infringing names – such "Galyum Spy Phone" – in response to Plaintiff's trademark
9 complaints, the Google Play Team informed Plaintiff that, this time, Google would take no action,
10 stating:

11 As a preliminary matter, please note that Google is not in a position to mediate
12 trademark disputes between developers and trademark owners. As a courtesy we have
13 considered your claim, but are unable to determine its merits at this time.

14 86. On June 28, 2013, the Google Play Team sent Plaintiff a notice stating that, in
15 response to a complaint that it had received about Plaintiff's App, Plaintiff's App had been removed
16 from Google Play and Plaintiff's developer account had been terminated.

17 87. The reason given by the Google Play Team for the removal of Plaintiff's App
18 from Google Play was that it violated Google's anti-spyware policy.

19 88. Plaintiff was not provided with a copy of the complaint that was supposedly
20 filed nor the identity of the complaining party.

21 89. Plaintiff was given no prior notice, warning or opportunity to correct any
22 alleged problems with Plaintiff's App before the takedown and termination of its developer account.

23 90. At the time of Plaintiff's App was removed from Google Play and its
24 developer account was terminated, Plaintiff was in full compliance with all terms and conditions of
25 the DDA.

26 91. At the time of Plaintiff's App was removed from Google Play and its
27 developer account was terminated, Plaintiff's App complied in all respects with Google Play's extant
28 Developer Program Policies, including its anti-spyware policy.

1 92. The alleged complaint asserting that Plaintiff's App violated Google Play's
2 Developer Program Policies was false and was known by the members of the Google Play Team who
3 reviewed the complaint to be false.

4 93. Upon information and belief, the false complaint that led to the removal of
5 Plaintiff's App from Google Play was submitted by or at the behest of Ciuca, one or more of the Doe
6 Defendants and/or one or more members of the Google Play Team, who were retaliating against
7 Plaintiff for filing trademark infringements complaints against competing apps and/or sought to
8 eliminate Plaintiff as a competitor.

9 94. Although unknown to Plaintiff at the time of the June 2013 takedown and
10 termination, Plaintiff subsequently learned (as described below) that Google and its employees on
11 the Google Play Team knew that there was no real justification to take down Plaintiff's App from
12 the Store or the termination of Plaintiff's developer account.

13 Google Eventually Agrees to Reinstate Plaintiff's Developer Account and Plaintiff's App, But
14 Only After Plaintiff Is Compelled to Stop Using Its Registered Trademark

15 95. At the time Plaintiff's developer account was terminated in June 2013, Google
16 Play permitted a developer whose account was terminated to submit an online appeal explaining in
17 500 words or less why the developer believed that its termination was unjustified.

18 96. Under Google's appeal procedure, a developer may not view any of the
19 complaints that have been filed against it, may not speak to a live person, and may not submit any
20 supporting information beyond the 500-word explanation.

21 97. Plaintiff submitted an appeal in compliance with Google Play's online appeals
22 procedure.

23 98. Google denied Plaintiff's online appeal and refused to reinstate Plaintiff's
24 developer account without providing Plaintiff an explanation.

25 99. Following the denial of its online appeal, Plaintiff filed a lawsuit against
26 Google in New Jersey federal court demanding reinstatement of Plaintiff's App and Plaintiff's
27 developer account (the "First Lawsuit").
28

100. After Plaintiff filed the First Lawsuit, its counsel was able to speak to a live person employed by Google (an in-house lawyer), and requested an explanation as to the reasons for the takedown of Plaintiff's App and the termination of Plaintiff's developer account.

101. After numerous back-and-forth communications between Plaintiff's counsel and Google's in-house lawyer, the Google Play Team finally acknowledged that none of the functions or features of Plaintiff's App violated Google's extant anti-spyware policy or any of Google's other Developer Program Policies.

102. Nonetheless, Google still refused to reinstate Plaintiff's App because, according to the Google Play Team, Plaintiff's use of its registered trademark SPY PHONE® to identify Plaintiff's App violated the extant anti-spyware policy:

. . . While providing additional disclosure in the app description and regular notification to targeted phones are crucial steps to accomplishing policy compliance, the Google Play Team believes the app is still in violation of policy because of the app's title. App titles should not be misleading or represent the product as being spyware and/or capable of surreptitious tracking [emphasis added]. . . .

(A copy of the email from the Google Play Team, dated September 20, 2013, provided by Google's in-house counsel, is attached as Exhibit 2.)

103. Plaintiff's counsel responded by email, observing that not only does Plaintiff have a federally registered trademark for the brand name SPY PHONE®, there were currently dozens of other apps listed on Google Play performing similar functions as Plaintiff's App that contained the word "spy" in the title against which no action was being taken and that Plaintiff was being unfairly singled out as compared to other developers:

We do not understand Google Play's concern over the name of my client's app when there are dozens of other apps that perform the same or a similar function on Google Play that use the word "spy" in its name, including several that use my client's trademarked phrase "spy phone." I invite you to do to as I did just a few minutes ago and enter the phrase "spy phone" into the Google Play search bar and you will see what I mean.

104. In response, Google's in-house stated that the Google Play Team had informed her that, going forward, the Google Play Team intended to prohibit all developers from using the

1 word “spy” in the title an app listed on Google Play, and stated definitively that Plaintiff must stop
2 using its SPY PHONE® trademark if Plaintiff wanted to have Plaintiff’s App listed on Google Play
3 anywhere in the world.

4 105. Given the options of not being permitted to list Plaintiff’s App on Google Play
5 (from which over 90% of all Android®-based apps are downloaded) or no longer being able to list
6 Plaintiff’s App under the SPY PHONE® trademarked brand, Plaintiff was compelled to capitulate
7 to Google’s demand and discontinue use of its SPY PHONE® trademark to identify Plaintiff’s App.

8 106. At the same time, based on Google’s representation that no developers were
9 going to be permitted to use the word “spy” in the title of an app, Plaintiff believed that the harm to
10 its business resulting from not being able to use its SPY PHONE® to identify Plaintiff’s App on
11 Google Play would be diminished because there would effectively be a level playing field.

12 107. Plaintiff also relied on Google’s representation that all developers were going
13 to be prohibited from using the word “spy” in the title of an app in agreeing to dismiss the First
14 Lawsuit without prejudice.

15
16 While Plaintiff was Forced To Change the Name of Plaintiff’s App, Other Developers
Were Allowed To Operate as Usual and Use Plaintiff’s Trademark Worldwide

17 108. In or about October 2013, Google reinstated Plaintiff’s developer account, but
18 only after deleting the content relating to all versions of Plaintiff’s App, including all the consumer
19 reviews and records of downloads for Plaintiff’s App appearing under the brand name SPY
20 PHONE®, which had previously contributed to Plaintiff’s App achieving a top ranking on Google
21 Play and the concomitant financial benefit.

22 109. Plaintiff objected to the deletion of the customer reviews for Plaintiff’s App,
23 but Google refused to reinstate those reviews.

24 110. Soon after its developer account was reinstated, Plaintiff began offering
25 Plaintiff’s App for download on Google Play under the name “Phone Tracker.”

26 111. For the ten-month period between October 2013 and July 2014, the number of
27 downloads for Plaintiff’s App under the name “Phone Tracker” plummeted to approximately
28

1 260,000, as compared to more than 1.1 million for the ten-month period between August 2012 and
2 June 2013 when Plaintiff's App had offered Plaintiff's App under the SPY PHONE® brand.

3 112. To this day, as compared to the monthly rate of downloads for Plaintiff's App
4 when listed on Google Play under the trademarked name SPY PHONE®, Plaintiff has never achieved
5 anything close to the same number of downloads for Plaintiff's App under the name Phone Tracker.

6 113. The steep reduction in the number of downloads resulted in a steep reduction
7 in Plaintiff's advertising revenue through Google's AdSense® program.

8 114. Meanwhile, contrary to Google's representation that it was instituting a policy
9 to prevent all developers from using the word "spy" in the title of an app listed on Google Play –
10 which necessarily would also have prevented developers from using names that infringed on
11 Plaintiff's SPY PHONE® trademark – dozens and dozens of other developers, including Ciuca and
12 the Doe Defendants, continue to list monitoring and other apps on Google Play under titles that
13 contained the word "spy."

14 115. Google's practice of allowing apps with the word "spy" in the title has
15 continued even with respect to new apps listed after January 2015, despite the fact that, since at least
16 January 2015, all new apps are subject to a "human review" to ensure compliance with all of Google
17 Play's extant Developer Program Policies.

18 116. Many of the monitoring apps listed on Google Play that used the word "spy"
19 in the name after Google supposedly established a policy to prohibit developers from being permitted
20 to use the word "spy" in the title of an app have actually copied or incorporated verbatim Plaintiff's
21 SPY PHONE® trademark.

22 117. While the full list can only be obtained through discovery, the following is a
23 partial list of the apps that have been listed on Google Play since Google supposedly established a
24 policy to prohibit developers from being permitted to use the word "spy" in the title of an app: (a)
25 "Phone Spy: Call, SMS"; (b) "Ear Spy"; (c) "Phone Spy: GPS, SMS"; (d) "CPU Spy"; (e) "Spy
26 Message"; (f) "Cell Spy"; and (g) "Spy Camera."

27 118. While the full list can only be obtained through discovery, the following is a
28 partial list of additional apps that contain the word "spy" in the title and which were first made

1 available for download on Google Play after January 2015, the date from which all new apps listed
2 on Google Play have supposedly been subject to a “human review” to ensure compliance with all of
3 Google Play’s extant Developer Program Policies: (a) “spyphone on your phone” (b) “spy secret
4 video camera”; (c) “Drone Spy”; (d) “Domain Spy”; (e) “Phone Spy simulated”; and (f) “Spy mobile
5 prank,” which uses “Spy Phone” as its logo.

6 119. While the full list can only be obtained through discovery, the following is a
7 partial list of the apps made available for download on Google Play since October 2013, when Google
8 supposedly established a policy to prohibit developers from being permitted to use the word “spy”
9 in the title, with titles that actually copied or incorporated verbatim Plaintiff’s SPY PHONE®
10 trademark: (a) “Spy Phone”; (b) “SpyPhone 1.0”; and (c) “spyphone on your phone”.

11 120. Notably, even if Plaintiff had submitted online trademark complaints to the
12 Google Play Team about an app that actually copied verbatim Plaintiff’s SPY PHONE® trademark
13 and those complaints were deemed valid, Google would only take down those apps in the countries
14 where Plaintiff’s trademark is registered – the U.S. and, after July 2013, Turkey, Mexico, South
15 Korea and Australia.

16 121. In other words, while Plaintiff, since October 2013, has been prohibited from
17 using its SPY PHONE® trademark on Google Play worldwide due to Google having forced Plaintiff
18 to stop using its mark as a condition for the reinstatement of Plaintiff’s developer account, other
19 developers not subject to the same restriction can list their apps under the name “spy phone” in
20 countries where Plaintiff’s trademark is not registered, and Plaintiff cannot stop it by filing a
21 trademark complaint.

22 122. For example, while Google has previously removed “SpyPhone 1.0” from
23 Google Play U.S. in response to Plaintiff’s complaint that this app infringed on its trademark, that
24 exact same app is available on the version of Google Play accessible to consumers in the United
25 Kingdom, where it currently appears as the top-ranked app for a search of the phrase “spy phone,”
26 while Plaintiff’s App, which Plaintiff has listed as Phone Tracker because Google has prohibited
27 Plaintiff from using its trademark SPY PHONE® on Google Play worldwide, is currently ranked
28 sixth for the same search. (A copy of a screen shot, taken on April 7, 2016, for the results of a search

1 conducted for the phrase “spy phone” on the version of Google Play accessible in the United
2 Kingdom, is attached as Exhibit 3.)

3 123. Through the Google Play Team’s “human review” of new apps, its
4 independent monitoring of existing apps on Google Play and its investigation of complaints, Google
5 is and has been aware that, since at least January 2015, apps have been listed on Google Play using
6 the word “spy” in the title even though Google supposedly established a policy to prohibit such
7 practice.

8 124. Upon information and belief, Plaintiff was and is the only app developer who
9 has ever been subjected to Google’s supposed policy prohibiting developers from using the word
10 “spy” in the title of an app listed on Google Play and the only developer against whom this supposed
11 policy has been made a condition of maintaining a developer account.

12
13 Plaintiff’s Additional Complaints Lead To a Second Suspension From Google Play

14 125. After realizing that Google did not actually have or was not enforcing its
15 supposed policy prohibiting developers from using the word “spy” in the title of an app listed on
16 Google Play (except as it applied to Plaintiff), starting in or around January 2014, Plaintiff began
17 submitting complaints to Google about certain apps that were using the word “spy” in the title,
18 asserting that these apps were violating the anti-spyware policy in Google Play’s extant Developer
19 Program Policies.

20 126. In response to these complaints, Google removed some apps from Google
21 Play, but other apps with the word “spy” in their title were not taken down by the Google Play Team.

22 127. Upon information and belief, none of the developers whose apps were taken
23 down in response to Plaintiff’s spyware complaints had their developer accounts suspended or
24 terminated.

25 128. Further, in many instances, apps that were taken down as a result of Plaintiff’s
26 complaints were re-listed in Google Play by the developer after the takedown.

1 129. On July 2 and 10, 2014, Plaintiff's representative submitted complaints to the
2 Google Play Team against a monitoring app listed on Google Play that used the word "spy" in its
3 title.

4 130. Upon information and belief, the developer of the app about which these
5 complaints were lodged was Ciuca, the same developer against whom Plaintiff had submitted a
6 trademark infringement complaint shortly before Plaintiff's developer account was terminated in
7 June 2013.

8 131. On or around July 16, 2014, Plaintiff was notified by the Google Play Team
9 that its developer account was being suspended and that Plaintiff's App had been removed from
10 Google Play for violation of the "spam" policy contained in Google Play's Developer Program
11 Policies.

12 132. Plaintiff was not provided with a copy of the complaint that was supposedly
13 filed nor the identity of the complaining party.

14 133. Plaintiff was given no prior notice, warning or opportunity to correct any
15 alleged problems with Plaintiff's App before the takedown and suspension of its developer account.

16 134. At the time Plaintiff's App was removed from Google Play and its developer
17 account was suspended, Plaintiff was in full compliance with all terms and conditions of the DDA.

18 135. At the time of Plaintiff's App was removed from Google Play and its
19 developer account was suspended, Plaintiff's App complied in all respects with Google Play's extant
20 Developer Program Policies, including the anti-spam policy.

21 136. The alleged complaint asserting that Plaintiff's App violated Google Play's
22 Developer Program Policies was false and was known by the members of the Google Play Team who
23 reviewed the complaint to be false.

24 137. Upon information and belief, the false complaint that led to the removal of
25 Plaintiff's App from Google Play was submitted by or at the behest of Ciuca, one or more of the Doe
26 Defendants and/or members of the Google Play Team, who sought to retaliate against Plaintiff for
27 filing anti-spyware complaints against competing apps and/or sought to remove Plaintiff as a
28 competitor.

1 138. Shortly after Plaintiff's suspension, as if to demonstrate his ability to act with
2 impunity, Ciuca listed a monitoring app in Google Play under the name "Spy Phone App Parental
3 Control," which incorporates and infringes upon Plaintiff's SPY PHONE® trademark.

4 139. At or around the same time that Ciuca listed "Spy Phone App Parental
5 Control" on Google Play, Ciuca also listed four other monitoring apps for download on Google Play
6 under four different aliases: (a) "Mobile tracker Whatsapp tracer"; (b) "Cell Phone tracker spy"; (c)
7 "Cell tracker | Phone tracer"; and (d) "GPS tracker Family finder."

8 140. Ciuca's connection to each of those parental monitoring apps is established by
9 the fact that each of the domain names for the websites associated with those apps is registered to
10 Ciuca, according to the "Who Is" domain registration directory.

11 141. It was a violation of Google Play's extant Developer Program Policies for a
12 developer to list multiple apps of Google Play that perform the same function under different names.

13 142. The Google Play Team took no action against Ciuca for listing multiple apps
14 that perform the same function under different names.

15 143. Following the removal of Plaintiff's App for supposedly violating Google
16 Play's anti-spam policy, to test whether the anti-spam policy was being applied uniformly to all
17 developers, Plaintiff lodged complaints using Google's online form against other monitoring apps
18 that were transmitting and collecting data in the same manner as Plaintiff's App.

19 144. The Google Play Team took no action against the other monitoring apps
20 against which complaints were filed and those apps remained available for download on Google Play.

21
22 Plaintiff Receives a Letter Confirming Its Suspicions That
23 Google's Actions Against It Were Taken Knowingly and In Bad Faith

24 145. Given that Plaintiff's App was taken down and his developer account was
25 suspended or terminated twice within days of lodging complaints against apps listed on Google Play
26 by Ciuca, Plaintiff suspected that Ciuca or some outside motivation or interest somehow exerted
27 influence over one or more members of the Google Play Team, but lacked any concrete evidence.

1 146. Then, approximately a month after its developer account was suspended in
2 July 2014, Plaintiff received an anonymous letter in the mail from a “Concerned Google Play
3 Member” who confirmed Plaintiff’s suspicions that members of the Google Play Team gave
4 preferential treatment to certain app developers. (A copy of the anonymous letter received by
5 Plaintiff is attached hereto as Exhibit 4.)

6 147. The author of the letter confirmed Plaintiff’s belief that “there was no real
7 justification” for the adverse actions taken against Plaintiff in 2013 and 2014, and that Plaintiff was
8 being singled out for unfair treatment in retaliation for its success and for filing complaints seeking
9 to enforce its rights in the SPY PHONE® trademark:

To Spy Phone Labs management;

I am uneasy with treatment of your company by other Google Play team members. I
want to share with you the reasons.

When you put in those Trademark Takedown notices you beacame [sic] a pariah
around here. A small company like you should have known better than to send those
notices in as you angered many people. Small companies like yours are not supposed
to be wasting our time with your trademark notices.

We all thought you were gone last year but we did not anticipate you filing a lawsuit
last year as everyone else we get rid of goes away quietly.

The only reason you were brought back was that there was no real justification to get
rid of you. They did not want thaT TO COME OUT [sic]. They just made the excuse
up that you were using the spyphone name as they needed a cover for thier [sic]
actions. There is no formal policy against [sic] using spyphone except against your
company.

Many of the people in the store enchance [sic] their income by making their own apps
or helping out other apps in the store. The problem you have is that your app is
suceessfull [sic] and it costs those apps money and downloads.

When you sent in your last takedown noticeyou [sic] needed to be taken out. They
just got someone to send in a complaint against your app and then you are instantly
gone. Someone needs to do something or things will just get worse.

Concerned Google Play Member

(Exhibit 4.)

148. The letter that Plaintiff received establishes that Plaintiff’s SPY PHONE®
trademark, and Plaintiff’s efforts to enforce its U.S. trademark rights, were well-known to members
of the Google Play Team.

149. The letter that Plaintiff received establishes that Google had specific knowledge of the activities of Ciuca and the Doe Defendants, including the filing of false complaints and Ciuca listing the infringing app “Spy Phone App Parental Control” in the Store shortly after Plaintiff’s App was taken down and Plaintiff’s developer account was suspended in July 2014.

150. The letter that Plaintiff received establishes that Google was specifically aware (or was willfully blind to the fact) that other developers were listing apps in Google Play U.S. that infringed upon Plaintiff’s SPY PHONE® trademark, but Google took no action to take down those infringing apps.

151. The letter that Plaintiff received establishes that the Google Play Team had had no justification for taking down Plaintiff’s App for violating Google Play’s Developer Program Policies and that Google acted in bad faith and abused its discretion under the DDA in taking down Plaintiff’s App.

Google’s Actions After This Lawsuit Was Filed Further Demonstrate Its Complicity
In and Acquiescence To Other Developers’ Infringement of Plaintiff’s Trademark

152. Plaintiff commenced this action in the United States District Court for the District of New Jersey on or about October 22, 2014.

153. On or about January 23, 2015, Plaintiff filed an amended complaint, which was served on Google’s counsel via the ECF system that same date.

154. The amended complaint (at ¶ 120) identified a monitoring app that was then available for download on Google Play U.S. under the name “SpyPhone 1.0” as an app that was actually infringing on Plaintiff’s Spy Phone® trademark.

155. Despite actual notice of direct infringement of Plaintiff’s Spy Phone® trademark on January 23, 2015, Google took no action stop “SpyPhone 1.0” from infringing on Plaintiff’s mark in the U.S. or the other countries where Plaintiff’s mark was registered until on or about February 10, 2015, 18 days after Google first received notice.

156. On or about February 10, 2015, the Google Play Team sent Plaintiff’s representative a notice stating that SpyPhone 1.0 had been taken down from Google Play within the jurisdictions in which plaintiff had registered its SPY PHONE® trademark in response to Plaintiff’s

1 assertion of trademark infringement in the amended complaint. (A copy of the notice received from
2 the Google Play Team is attached as Exhibit 5.)

3 157. On February 17, 2015, Plaintiff's representative received another notice from
4 the Google Play Team stating that a monitoring app listed for download on Google Play by a
5 developer named Maco under the name "Spy Phone 2" had been removed from Google Play in the
6 jurisdictions where Plaintiff's Spy Phone® trademark is registered. (A copy of the notice received
7 from the Google Play Team is attached as Exhibit 6.)

8 158. Prior to this takedown by the Google Play Team, Plaintiff had not identified
9 "Spy Phone 2" in its amended complaint, nor had Plaintiff lodged an online trademark complaint
10 with Google requesting a takedown of the "Spy Phone 2" app.

11 159. On Google's motion, this action was transferred from the United States
12 District Court for the District of New Jersey to this Court on August 13, 2015.

13 160. After transfer, Google moved to dismiss the amended complaint.

14 161. On March 21, 2016, this Court granted Google's motion to dismiss, but
15 granted Plaintiff leave to amend its amended complaint within 21 days.

16 162. During the 21-day period between the time the Court granted Plaintiff leave
17 to amend its amended complaint and the date this second amended complaint was filed, upon
18 information and belief, Google independently took down at least four apps that had been available
19 for download on Google Play U.S. for at least 30 days prior to the takedown and that directly
20 infringed on Plaintiff's Spy Phone trademark: (a) "Spy Phone 2.0 by Magma"; (b) "Epf Spy Phone";
21 (c) "MySpyPhone"; and (d) "Spy Phone - Aplikacije za Android."

22 163. Prior to the removal of these four apps from Google Play, Plaintiff had not
23 identified any of them in its amended complaint, nor had Plaintiff lodged an online trademark
24 complaint with Google requesting their takedown.

25 164. Google's actions in independently taking down several apps that infringed on
26 Plaintiff's SPY PHONE® trademark without a specific complaint or request from Plaintiff
27 demonstrates that Google has the ability to independently monitor apps for trademark infringement
28 on Google Play and actually performs such independent monitoring.

165. The statements in the letter from the “Concerned Google Play Member” (Exhibit 4), which establish, among other things, that Google was aware, through its employees on the Google Play Team, of Plaintiff’s efforts to enforce its rights in its SPY PHONE® trademark and repeated infringement by other developers, when combined with evidence that the Google Play Team can and does independently monitor apps listed on Google Play for instances of trademark infringement, establish that Google actually knew of (or was willfully blind to) instances where Plaintiff’s trademark was being infringed by other developers since at least June 2013, but continued to permit such developers to list infringing apps on Google Play.

Google Continues To Apply Its Supposed Policy Prohibiting
App’s With the Word “Spy” in the Title Only To Plaintiff

166. On April 1, 2016, Plaintiff’s representative lodged online complaints against five highly-ranked apps with the word “spy” in the title: (a) a monitoring app with similar functionality to Plaintiff’s App called “Text Spy + FB, Line, Location”; (b) “Spy Camera HD,” a camera app with over 10 million downloads; (c) “Wifi Spy,” an app with 5 million downloads that claims it can detect authorized wireless users; (d) “Ear Spy – Super Hearing,” an app that claims it can turn a phone into a device for eavesdropping; and (e) “Spy Net Lie Detector,” an app that claims it can simulate a lie detector.

167. Google has taken no action to remove any of these apps from Google Play as of the date of this second amended complaint.

AS AND FOR A FIRST CAUSE OF ACTION

(Trademark Infringement/Trademark Dilution Against Ciuca and the Doe Defendants)

168. Plaintiff repeats and realleges the foregoing paragraphs of the complaint as if fully set forth herein.

169. Under § 32(a) of the Lanham Act, 15 U.S.C. § 1114(a), any person who uses in commerce any word, term or name or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association

1 of such person with another person, or as to the origin, sponsorship, or approval of his or her goods,
2 services, or commercial activities by another person, shall be liable in a civil action by any person
3 who believes that he or she is or is likely to be damaged by such act.

4 170. Under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), any person who, in
5 connection with any goods or services, uses in commerce any word, term, name, symbol, or device,
6 or any combination thereof, or any false designation of origin, false or misleading description of fact,
7 or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake,
8 or to deceive as to the affiliation, connection, or association of such person with another person, or
9 as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by
10 another person shall be liable in a civil action by any person who believes that he or she is or is likely
11 to be damaged by such act.

12 171. Since at least May 2013, Ciuca and the Doe Defendants, individually and/or
13 collectively, have offered and continue to offer apps for download on Google Play under the name
14 SPY PHONE®.

15 172. The acts of Ciuca and the Doe Defendants, as described above, infringe on
16 and diluted Plaintiff's federally registered SPY PHONE® trademark in violation of § 32(a) of the
17 Lanham Act, 15 U.S.C. § 1114(a) and § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

18 173. As a proximate result of the infringing actions taken by Ciuca and the Doe
19 Defendants, Plaintiff has suffered and will continue to suffer damage to its business, goodwill,
20 reputation, profits and the strength of its SPY PHONE® trademark.

21 174. An award of monetary damages alone cannot fully compensate Plaintiff for its
22 injuries and Plaintiff lacks an adequate remedy at law.

23 175. The acts of infringement and dilution by Ciuca and the Doe Defendants have
24 been and continue to be deliberate, willful and wanton, making this an exceptional case within the
25 meaning of 15 U.S.C. § 1117.

26 176. Plaintiff is entitled to a preliminary and permanent injunction against Ciuca
27 and the Doe Defendants, as well as all other remedies available under the Lanham Act, including,
28

1 but not limited to statutory damages, compensatory damages, treble damages, disgorgement of
2 profits, costs and attorneys' fees.

3
4 AS AND FOR A SECOND CAUSE OF ACTION
5 (Contributory Trademark Infringement Against Google)

6 177. Plaintiff repeats and realleges the foregoing paragraphs of the complaint as if
7 fully set forth herein.

8 178. Google has direct control over the operations of Google Play.

9 179. Google has the ability to monitor the content posted on Google Play and does,
10 in fact, regularly monitor the content posted on Google Play to ensure compliance with Google's
11 Developer Program Policies.

12 180. Since at least January 2015, Google has conducted "human reviews" of all
13 new apps listed for download on Google Play to ensure compliance with Google's Developer
14 Program Policies.

15 181. At all relevant times since at least June 2013, Google has been aware of
16 Plaintiff's SPY PHONE® trademark and Plaintiff's efforts and intention to enforce its trademark
17 rights.

18 182. Ciuca and the Doe Defendants have utilized Google Play to infringe on and
19 dilute Plaintiff's federally registered SPY PHONE® continuously and repeatedly since at least June
20 2013 .

21 183. Since at least June 2013, as a result of complaints lodged against specific apps
22 as well as Google's independent monitoring of the content on Google Play, Google has had actual
23 knowledge of particular apps posted by Ciuca and the Doe Defendants on Google Play that infringe
24 on and diluted Plaintiff's registered SPY PHONE® trademark, or has turned a blind eye to the
25 presence of such infringing apps on Google Play with knowledge that of the infringement in the
26 countries where Plaintiff's mark is registered.

27 184. Even in instances where Google has taken down apps that Google knew to be
28 infringing on and diluting Plaintiff's Spy Phone® trademark, Google failed to act in a timely and
reasonable manner to remove infringing apps from Google Play, thereby permitting such infringing

1 apps to remain available for download and for infringement to continue for an unreasonable period
2 of time after Google had actual notice of infringement.

3 185. Google has continued to supply its services to Ciuca and the Doe Defendants
4 with knowledge that they are offering apps for download on Google Play with names that infringe
5 on Plaintiff's registered SPY PHONE® trademark.

6 186. Google's actions are willful and with actual knowledge that Ciuca and the Doe
7 Defendants have used and are continuing to use Google Play as an instrumentality to engage in direct
8 trademark infringement and dilution of Plaintiff's SPY PHONE® trademark.

9 187. Google's acts and omission as described above constitute contributory
10 trademark infringement.

11 188. As a proximate result of the Google's actions or failure to act, Plaintiff has
12 suffered and will continue to suffer damage to its business, goodwill, reputation, profits and the
13 strength of its SPY PHONE® trademark.

14 189. An award of monetary damages alone cannot fully compensate Plaintiff for its
15 injuries and Plaintiff lacks an adequate remedy at law.

16 190. Google's acts of contributory infringement have been and continue to be
17 deliberate, willful and wanton, making this an exceptional case within the meaning of 15 U.S.C. §
18 1117.

19 191. Plaintiff is entitled to a preliminary and permanent injunction against Google,
20 as well as all other remedies available under the Lanham Act, including, but not limited to statutory
21 damages, compensatory damages, treble damages, disgorgement of profits, costs and attorneys' fees.

22
23 AS AND FOR A THIRD CAUSE OF ACTION
24 (Tortious Interference With Contract Against All Defendants)

25 192. Plaintiff repeats and realleges the foregoing paragraphs of the complaint as if
26 fully set forth herein.

27 ///

1 193. Plaintiff, at all relevant times, has had a contract with Google through its
2 AdSense® program under which Plaintiff earns revenue from advertising placed on Plaintiff's
3 website at <spyphone.com>.Plaintiff has at all times complied with the terms of this contract.

4 194. Under the terms of Plaintiff's contract with Google under the AdSense®
5 program, the revenue that Plaintiff earns increases based on the number of visitors to Plaintiff's
6 website, which, in turn increases based on the number of consumers that download Plaintiff's App.

7 195. All defendants are aware that Plaintiff generates revenue through the
8 AdSense® program and, therefore, had and has knowledge of Plaintiff's contract with Google under
9 the AdSense® program.

10 196. The acts of Ciuca and the Doe Defendants, which include infringing on
11 Plaintiff's Spy Phone® trademark, causing Plaintiff to be removed from Google Play by the filing of
12 false complaints against Plaintiff's App and/or actively encouraging members of the Google Play
13 Team to take adverse action against Plaintiff to remove Plaintiff's App from Google Play, were
14 intended to disrupt Plaintiff's contractual relationship under the AdSense® program.

15 197. The acts of Google, acting through the Google Play Team without the
16 knowledge or consent of the employees in the business unit that operates Google's AdSense®
17 program, which include, abusing its discretion to take down non-compliant apps under § 7.2 of the
18 DDA, violating the implied covenant of good faith and fair dealing contained in the DDA,
19 prohibiting Plaintiff from offering Plaintiff's App for download on Google Play under the brand
20 name SPY PHONE® without justification while allowing other developers to list apps using the
21 word "spy" and the phrase "spy phone," terminating and/or suspending Plaintiff's developer account
22 without justification or contractual basis, and taking adverse action against Plaintiff at the behest of
23 developers who compete with Plaintiff, were intended to disrupt Plaintiff's contractual relationship
24 under the AdSense® program.

25 198. The acts of defendants described herein caused an actual disruption of
26 Plaintiff's contractual relationship under the AdSense® program because the unjustified removal of
27 Plaintiff's App from Google Play reduced the number of consumers that downloaded Plaintiff's App
28

1 which, in turn, reduced the number of visitors to Plaintiff's website at <spyphone.com> and
2 decreased Plaintiff's revenue.

3 199. The acts of defendants caused Plaintiff to suffer damages in the form of
4 decreased advertising revenue under the AdSense® program.

5 200. Plaintiff is entitled to damages for past and present harm as well as injunctive
6 relief to restrain defendants from interfering with its contractual relationship.

7
8 AS AND FOR A FOURTH CAUSE OF ACTION

(Tortious Interference With Prospective Economic Advantage Against All Defendants)

9 201. Plaintiff repeats and realleges the foregoing paragraphs of the complaint as if
10 fully set forth herein.

11 202. Plaintiff earned an average of 45¢ in advertising revenue per download of
12 Plaintiff's App from April 2013 through December 2015 and has earned 22.5¢ per download of
13 Plaintiff's App thereafter, establishing an economic relationship with the probability of future
14 economic benefit between Plaintiff and the owners of Android®-based mobile devices who wish to
15 download Plaintiff's App on Google Play.

16 203. All defendants were aware of the prospective relationship between Plaintiff
17 and the owners of Android®-based mobile devices who wish to download Plaintiff's App on Google
18 Play.

19 204. Ciuca and the Doe Defendants, intentionally and without justification or
20 excuse, interfered with Plaintiff's economic relationship with owners of Android®-based mobile
21 devices who wished to download Plaintiff's App on Google Play by taking the actions described
22 above, which include, among other things, offering apps for download on Google Play with names
23 that infringe on Plaintiff's SPY PHONE® trademark, submitting false complaints to the Google Play
24 Team about Plaintiff's App with the intention of having Plaintiff's App removed from Google Play,
25 and actively encouraging members of the Google Play Team to take adverse action against Plaintiff
26 to prevent him from engaging in fair business competition.

27 205. Google, acting by and through its employees on the Google Play Team,
28 intentionally and without justification or excuse, interfered with Plaintiff's economic relationship

1 with owners of Android®-based mobile devices who wished to download Plaintiff's App on Google
2 Play by taking the actions described above, which include, among other things, abusing its discretion
3 to take down non-compliant apps under § 7.2 of the DDA, violating the implied covenant of good
4 faith and fair dealing contained in the DDA, prohibiting Plaintiff from offering Plaintiff's App for
5 download on Google Play under the brand name SPY PHONE® without justification while allowing
6 other developers to list apps using the word "spy" and the phrase "spy phone," terminating and/or
7 suspending Plaintiff's developer account without justification or contractual basis, and taking
8 adverse action against Plaintiff at the behest of developers who compete with Plaintiff.

9 206. The actions of defendants described above actually interfered with the
10 economic relationship between Plaintiff and the owners of Android®-based mobile devices who wish
11 to download Plaintiff's App on Google Play because Plaintiff's App could not be downloaded at all
12 during the periods that Plaintiff's App had been removed from Google Play and Plaintiff's App was
13 downloaded less frequently than it would have had Plaintiff been permitted to identify Plaintiff's
14 App using its SPY PHONE® trademark instead of being forced to use the name Phone Tracker.

15 207. The actions of all defendants described above, including violations of the
16 Lanham Act, the filing of false complaints by Ciuca and the Doe Defendants, and Google's breach
17 of the implied covenant of good faith and fair dealing in the DDA in removing Plaintiff's App from
18 Google Play and terminating or suspending Plaintiff's developer account, each constitutes an act that
19 is independently wrongful apart from the interference with Plaintiff's economic relationships.

20 208. As a proximate result of defendants' interference with Plaintiff's relationship
21 economic with the owners of Android®-based mobile devices who wish to download Plaintiff's App
22 on Google Play, Plaintiff suffered a loss of advertising revenue.

23 209. In addition to economic damages, Plaintiff has suffered and will continue to
24 suffer irreparably harm to its business that is being proximately caused by defendants' actions as
25 described above, for which Plaintiff has no adequate remedy at law.

26 210. Plaintiff is entitled to damages for past and present harm as well as injunctive
27 relief to restrain defendants from interfering with its business.

28 ///

AS AND FOR A FIFTH CAUSE OF ACTION

(Breach of Contract and the Covenant of Good Faith and Fair Dealing Against Google)

211. Plaintiff repeats and realleges the foregoing paragraphs of the complaint as if fully set forth herein.

212. Plaintiff and Google are parties to the DDA, which is a valid and binding contract.

213. The DDA contains an implied covenant of good faith and fair dealing in its performance and its enforcement.

214. Plaintiff fully performed its obligations under the DDA.

215. Google breached the implied covenant of good faith and fair dealing in the parties' agreement, by removing Plaintiff's App from Google Play in bad faith and without justification, by abusing the discretion afforded to Google with respect to app takedowns under § 7.2 of the DDA, by abusing the discretion afforded to Google under § 7.2 of the DDA, and through its bad faith and unjustified determination that Plaintiff's use of its SPY PHONE® trademark to identify Plaintiff's App violated one or more of Google Play's Developer Program Policies.

216. Google further breached the parties' agreement by deleting and refusing to allow Plaintiff to re-post customer reviews of Plaintiff's App after Plaintiff's developer account was reinstated after being unjustifiably terminated and suspended in 2013 and 2014.

217. Plaintiff is entitled to damages proximately caused by Plaintiff's breach in an amount to be proven at trial.

218. Plaintiff is entitled to a declaration that the use of its SPY PHONE® trademark to identify Plaintiff's App does not violate the terms of the DDA.

AS AND FOR A SIXTH CAUSE OF ACTION

(Violation of Cal. Bus. and Prof. Code §§ 17200 *et seq.* Against All Defendants)

219. Plaintiff repeats and realleges the foregoing paragraphs of the complaint as if fully set forth herein.

220. The California UCL prohibits a person from engaging in an unlawful, unfair or fraudulent business act or practice.

221. Defendants' actions as described above, which include infringement on Plaintiff's SPY PHONE® trademark, submitting false complaints to the Google Play Team about Plaintiff's App, violating the implied covenant of good faith and fair dealing contained in the DDA and otherwise breaching the DDA, and/or suspending Plaintiff's developer account without justification, each constitute an act prohibited by the UCL.

222. Plaintiff is entitled to injunctive relief restraining defendants from taking any action to harm or interfere with Plaintiff's business, and, in particular, restraining defendants from taking any action to interfere with Plaintiff's lawful and legitimate right to use its SPY PHONE® trademark to identify Plaintiff's App.

WHEREFORE, Plaintiff demands judgment as follows:

A. on all counts, awarding Plaintiff a preliminary and permanent injunction: (i) that restrains and enjoins defendants, their agents, servants, employees, and all other persons in privity or acting in concert, from engaging in any conduct that infringes on Plaintiff's SPY PHONE® trademark, contributes to the infringement of Plaintiff's SPY PHONE® trademark by others and/or interferes with Plaintiff's rights to do business with prospective customers, and (ii) that compels Google to allow Plaintiff to use its SPY PHONE® trademark on Google Play and restore all deleted customer reviews and other information associated with Plaintiff's App;

B. on all counts except the Sixth Count, awarding Plaintiff damages that it has sustained as a consequence of defendants' conduct as described herein and, with respect to any damages awarded under claims brought under the Lanham Act, the trebling of all such damages pursuant to 15 U.S.C. § 1117 or, alternatively and at its election, an award of statutory damages pursuant to 15 U.S.C. § 1117 of up to \$2,000,000 for willful infringement and/or contributing to the willful infringement of Plaintiff's SPY PHONE® trademark;

C. on all claims brought under the Lanham Act, awarding Plaintiff reasonable attorneys' fees pursuant to 15 U.S.C. § 1117;

D. awarding Plaintiff the costs of this action and pre-judgment interest;

1 and

2 E. for such other and further relief as the Court deems just and proper.

3 **JURY DEMAND**

4 Plaintiff demands a trial by jury on all issues so triable.

5 Dated: April 11, 2016

RIMON P.C.

7 By: /S/ Neil A. Smith
8 Neil A. Smith

9 GREENBERG FREEMAN LLP

10 By: /S/ Michael A. Freeman
11 Michael A. Freeman (*pro hac vice*)

12 Attorneys for the Plaintiff
13 SPY PHONE LABS LLC.

CERTIFICATE OF SERVICE

I, Neil A. Smith, hereby certify that on April 11, 2016 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

Date: April 11, 2016

RIMON PC

/s/ Neil A. Smith
NEIL A. SMITH
Attorneys for SPY PHONE LABS LLC

EXHIBIT B

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GOOGLE INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SPY PHONE LABS LLC,

Plaintiff,

v.

GOOGLE INC. and ANDREI CIUCA,

Defendants.

Case No. 5:15-cv-03756-PSG

**DEFENDANT GOOGLE INC.'S RENEWED
NOTICE OF MOTION AND MOTION TO
DISMISS PLAINTIFF'S AMENDED
COMPLAINT AS TO GOOGLE**

Date: November 24, 2015

Time: 10:00 a.m.

Ctrm: 5 – 4th Floor

Judge: Honorable Paul Singh Grewal

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on November 24, 2015 at 10:00 a.m., in Courtroom 5 of the above-entitled court, located at 280 South 1st Street, San Jose, CA 95113, Defendant Google Inc. (“Google” or “Defendant”) by its attorneys Durie Tangri LLP, will move and hereby moves, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing Plaintiff’s Amended Complaint against Google with prejudice.

This Motion is based upon this Notice of Motion and Memorandum of Points and Authorities in support thereof, the Declaration of Michael H. Page filed herewith, the Amended Complaint and other pleadings on file in this matter, the arguments of counsel, and all other material which may properly come before the Court at or before the hearing on this Motion.

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND FACTUAL SUMMARY	1
A. The Parties	1
B. Plaintiff Accepted the Terms of the Google Play DDA	2
C. Google Acted on Plaintiff's Trademark Complaints	3
D. Google Terminated, and Later Reinstated, Plaintiff's Account.....	3
E. Plaintiff Submitted Complaints of Alleged Policy Violations.....	4
F. Google Suspended Plaintiff's Account	5
G. The District of New Jersey Transfers the Case to This Court	6
II. ARGUMENT	6
A. PLAINTIFF'S CLAIM FOR CONTRIBUTORY TRADEMARK INFRINGEMENT SHOULD BE DISMISSED	6
B. Section 230 of the Communications Decency Act Bars Plaintiff's Claim for Tortious Interference.....	10
1. Google Play is an "Interactive Computer Service"	10
2. Google Blocked Material that Is "Objectionable"	11
3. Google Acted in Good Faith	12
C. Plaintiff has Failed to State a Tortious Interference Claim.....	13
III. CONCLUSION	16

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>A.J. Canfield Co. v. Honickman</i> , 808 F.2d 291 (3d Cir.1986).....	8
<i>Baztel v. Smith</i> , 333 F.3d 1018 (9th Cir. 2003)	10
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	14
<i>Carafano v. Metrosplash.com Inc.</i> , 339 F.3d 1119 (9th Cir. 2003)	10
<i>Coast Cities Truck Sales, Inc. v. Navistar Int’l Transp. Co.</i> , 912 F. Supp. 747 (D.N.J. 1995)	13
<i>Della Penna v. Toyota Motor Sales, U.S.A., Inc.</i> , 11 Cal 4th. 376 (1995)	13
<i>E Z Sockets, Inc. v. Brighton–Best Socket Screw Mfg. Inc.</i> , 704 A.2d 1364 (N.J. Super. Ct. Ch. Div. 1996), <i>aff’d</i> , 704 A.2d 1309 (N.J. Super. Ct. App. Div. 1997)	14
<i>e360Insight, LLC v. Comcast Corp.</i> , 546 F. Supp. 2d 605 (N.D. Ill. 2008)	10, 11, 12, 13
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996)	7
<i>Green v. Am. Online (AOL)</i> , 318 F.3d. 465 (3d. Cir. 2003).....	11
<i>Hebert v. Rapid Payroll, Inc.</i> , No. CV 02-4144 DT (PJXw), 2005 WL 6172659 (C.D. Cal. Feb. 9, 2005)	15
<i>Holomaxx Techs. v. Yahoo!, Inc.</i> , No. CV-10-4926-JF, 2011 WL 865794 (N.D. Cal. Mar. 11, 2011)	10, 11, 12
<i>In re Google Inc. Privacy Policy Litig.</i> , No. C–12–01382–PSG, 2013 WL 6248499 (N.D. Cal. Dec. 3, 2013)	11
<i>Inwood Laboratories, Inc. v. Ives Laboratories, Inc.</i> , 456 U.S. 844 (1982).....	6, 7, 8
<i>Jurin v. Google Inc.</i> , 695 F. Supp. 2d 1117 (E.D. Cal. 2010).....	11
<i>Korea Supply Co. v. Lockheed Martin Corp.</i> , 29 Cal. 4th 1134 (2003)	13

1	<i>Langdon v. Google, Inc.</i> ,	
2	474 F. Supp. 2d 622 (D. Del. 2007).....	11, 12
3	<i>Lockheed Martin Corp. v. Network Solutions, Inc.</i> ,	
4	194 F.3d 980 (9th Cir. 1999)	6, 8
5	<i>Lowell v. Mother's Cake & Cookie Co.</i> ,	
6	79 Cal. App. 3d 13 (1978)	14
7	<i>Mmubango v. Google Inc.</i> ,	
8	No. 12-1300, 2013 WL 664231 (E.D. Pa. Feb. 22, 2013)	11
9	<i>Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.</i> ,	
10	319 F. Supp. 2d 1040 (C.D. Cal. 2003)	15
11	<i>Nostrame v. Santiago</i> ,	
12	213 N.J. 109 (N.J. 2013)	14
13	<i>Novak v. Overture Servs., Inc.</i> ,	
14	309 F. Supp. 2d 446 (E.D.N.Y. 2004)	10
15	<i>Parker v. Google, Inc.</i> ,	
16	422 F. Supp. 2d 492 (E.D. Pa. 2006), <i>aff'd</i> , 242 Fed. App'x 833 (3d Cir. 2007)	11
17	<i>Peek & Cloppenburg KG v. Revue, Inc.</i> ,	
18	No. 11 Civ. 5967 (DAB), 2012 WL 4470556 (S.D.N.Y. Sept. 19, 2012)	8
19	<i>Petroliam Nasional Berhad v. GoDaddy.com, Inc.</i> ,	
20	897 F. Supp. 2d 856 (N.D. Cal. 2012), <i>aff'd</i> , 737 F.3d 546 (9th Cir. 2013), <i>cert. denied</i> , 135 S. Ct. 55 (2014)	6
21	<i>Printing Mart-Morristown v. Sharp Elecs. Corp.</i> ,	
22	116 N.J. 739 (N.J. 1989)	13, 14
23	<i>Smith v. Trusted Universal Stds. in Elec. Transactions, Inc.</i> ,	
24	No. 09-4567 (RBK/KMW), 2011 WL 900096 (D.N.J. Mar. 15, 2011)	10, 11, 12
25	<i>Strassle v. Bimbo Foods Bakeries Distrib., Inc.</i> ,	
26	No. 12-3313 (RBK/AMD), 2013 WL 1007289 (D.N.J. Mar. 13, 2013)	15
27	<i>Svenson v. Google Inc.</i> ,	
28	65 F. Supp. 3d 717 (N.D. Cal. 2014)	10
	<i>Tiffany (NJ) Inc. v eBay Inc.</i> ,	
	600 F.3d 93 (2d Cir. 2010).....	7, 8
	<i>Wexco Indus. v. ADM21 Co.</i> ,	
	No. 04-5244 (JLL), 2008 WL 5427867 (D.N.J. Dec. 30, 2008).....	13, 14
	<i>Zango, Inc. v. Kaspersky Lab, Inc.</i> ,	
	568 F.3d 1169 (9th Cir. 2009)	10, 12
	<i>Zango, Inc. v. Kaspersky Lab, Inc.</i> ,	
	No. C07-0807-JCC, 2007 WL 5189857 (W.D. Wash. Aug. 28, 2007).....	11

<i>Zeran v. Am. Online, Inc.</i> , 129 F.3d 327 (4th Cir. 1997)	11
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Statutes

15 U.S.C. § 1115(b)(4)	8
28 U.S.C. § 1404	6
47 U.S.C. § 230	10, 11, 12, 13

Rules

Fed. R. Civ. Proc. 12(b)(6)	6
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND FACTUAL SUMMARY

This case, recently transferred to this Court from the District of New Jersey, seeks to hold Google responsible for alleged trademark infringement by others, and for the alleged failure by Google to enforce its own content guidelines on its own website. Specifically, the Plaintiff seeks to hold Google liable for contributory trademark infringement (Count 2) and for tortious interference with prospective advantage (Count 3).¹

Both claims fail. The Amended Complaint affirmatively pleads that Google, upon receipt of valid trademark complaints, responded to those complaints by removing the allegedly infringing third-party content, meaning Google cannot be held liable for contributory infringement. The interference claim fails doubly: it is barred by the Communications Decency Act, and even were it not, it would fail on the merits, as there is no allegation that Google's alleged interference was independently wrongful. Accordingly, the claims against Google should be dismissed.

A. The Parties

Plaintiff allegedly owns the registered trademark SPY PHONE² and developed an app ("Plaintiff's App") for free download to mobile phones that use the Android operating system. Am. Compl.³ ¶¶ 29, 32, 37. When installed on a mobile phone, Plaintiff's App allows the user or an authorized third party to obtain extensive information about the phone's usage, including the phone's location, the phone number of the sender or recipient of incoming and outgoing messages, and Internet usage. *Id.* ¶ 33. Plaintiff allegedly generates revenue from Plaintiff's App through advertisements placed on its website located at www.spyphone.com. *Id.* ¶ 37.

¹ Count 1 is not pled against Google.

² Although not alleged in the Amended Complaint, Plaintiff is the purported assignee of those trademark rights, pursuant to a *nunc pro tunc* assignment dated October 20, 2014, and recorded with the U.S. Patent & Trademark Office on October 31, 2014. Google reserves its right to challenge the *bona fides* of this assignment, which states it is based on a 2012 "unwritten agreement." A certified copy of this recorded assignment is attached as Exhibit A to the Declaration of Michael H. Page ("Page Decl."), submitted herewith.

³ The Amended Complaint ("Am. Compl.") is attached as Exhibit B to the Page Declaration. "DDA" refers to the Developer Distribution Agreement, which was an exhibit to the previously filed Declaration of Bryan Woodward in Support of Defendant Google Inc.'s Motion to Transfer, or in the Alternative, to Dismiss the Complaint ("Woodward Decl.") (ECF Nos. 18-4 & 18-5). That declaration and exhibit are also attached to the accompanying Page Declaration for the Court's convenience as Exhibit C.

Google Play is Google’s digital distribution platform for app developers, serving as a marketplace for users to download apps to their Android devices. Am. Compl. ¶ 12; Woodward Decl. ¶ 3. End users can also post ratings of and comments about particular apps. Am. Compl. ¶¶ 13-14.

The Amended Complaint also alleges that the Individual Defendants, Andrei Ciuca (“Ciuca”) and John Does 1-49 (the “Doe Defendants”), are app developers who have infringed on Plaintiff’s trademark and/or interfered with Plaintiff’s prospective business relations. *Id.* ¶¶ 5-6. Although Plaintiff alleges that it complained to Google about the alleged conduct of these app developers, Plaintiff also contends that it does not know the names or legal capacities of the Doe Defendants. *Id.* ¶¶ 6, 49.

B. Plaintiff Accepted the Terms of the Google Play DDA

To distribute apps on Google Play, Plaintiff first had to create a Google Play developer account, pay a registration fee, and agree to the DDA (and the policies incorporated therein). Woodward Decl. ¶ 8(b). To complete that registration, Plaintiff was required (1) to acknowledge that it had agreed to the DDA by clicking a box below the window displaying the DDA and (2) again confirm that it agreed to the DDA by clicking a hyperlink at the bottom of the page. *Id.* ¶ 8(d). On August 1, 2012, Plaintiff completed its Google Play registration. *Id.* ¶¶ 8-9. Plaintiff published its first app on Google Play on August 13, 2012. *Id.* ¶ 9. The DDA makes clear that Plaintiff’s relationship to Google is contractual:

This [DDA] forms a legally binding contract between you and Google in relation to your use of the Market to distribute Products. In order to use the Market to distribute Products, you must first agree to this [DDA] by clicking to accept where this option is made available to you. You may not distribute products on the Market if you do not accept this Agreement.

DDA § 2.1(emphasis added). Section 7.2 of the DDA authorizes Google, in its sole discretion, to remove apps (referred to as “Products”) from Google Play for several reasons, including if Google deems a Product to be spyware:

Google Takedowns. While Google does not undertake an obligation to monitor the Products or their content, if Google is notified by you or otherwise becomes aware and determines in its sole discretion that a Product or any portion thereof or your Brand Features: (a) violates the intellectual property rights or any other rights of any third party; (b) violates any applicable law or is subject to an injunction; (c) is pornographic, obscene or otherwise violates Google’s hosting policies or other terms of service as may be updated by Google from time to time in its sole discretion; (d) is being distributed by you improperly; (e) may create liability for Google or Authorized Carriers; (f) is deemed by Google to have a virus or is deemed to be malware, spyware or have an adverse

1 impact on Google's or an Authorized Carrier's network; (g) violates the
 2 terms of this [DDA] or the Developer Program Policies for
 3 Developers; Google may remove the Product from the Market or
 reclassify the product at its sole discretion. Google reserves the right to
 suspend and/or bar any Developer from the Market at its sole discretion.

4 DDA § 7.2. Plaintiff admits that the DDA also incorporates by reference Google's Developer Program
 5 Policies and Google's Privacy Policy. Am. Compl. ¶ 20; DDA §§ 4.11, 9.2.

6 **C. Google Acted on Plaintiff's Trademark Complaints**

7 Plaintiff alleges that third parties have offered apps on Google Play "that copied or incorporated
 8 Plaintiff's SPY PHONE trademark and that performed the same or similar functions as Plaintiff's App."
 9 Am. Compl. ¶ 48. Using Google Play's online form, Plaintiff submitted trademark complaints to Google
 10 respecting those apps, and Google responded by removing them. *Id.* ¶ 49. When an app is suspended
 11 from Google Play based on an infringement complaint, Google notifies allegedly infringing developer,
 12 stating why its app had been removed and providing the name and address of the complainant. *Id.* ¶ 50.
 13 Accordingly, when Google removed the allegedly infringing apps from Google Play, Ciuca received
 14 notice. *Id.* ¶¶ 54-55, 64.

15 Plaintiff admits that from November 2012 through May 2013, in response to Plaintiff's trademark
 16 complaints, Google removed apps listed on Google Play by other developers. *Id.* ¶ 51. In June 2013, in
 17 response to a specific trademark complaint by Plaintiff, Google allegedly also removed an app listed by
 18 Defendant Ciuca. *Id.* ¶ 54. In only one instance, in June 2013, did Google allegedly respond to a
 19 specific trademark complaint submitted by Plaintiff by refusing to remove an app called "Reptilicus.net
 20 Brutal Spy Phone," based on Google's notification to Plaintiff that it was "not in a position to mediate
 21 trademark disputes between developers and trademark owners. As a courtesy we have considered your
 22 claim, but are unable to determine its merits at this time." *Id.* ¶¶ 58 & 59. Plaintiff does not allege that it
 23 followed up on that notice, or that it filed any further trademark complaints with Google.

24 **D. Google Terminated, and Later Reinstated, Plaintiff's Account**

25 On June 28, 2013, Google notified Plaintiff that the SPY PHONE app had been removed from
 26 Google Play and Plaintiff's developer account had been terminated, because the app "violated Google's
 27 'anti-spyware' policy." *Id.* ¶¶ 60-61. Plaintiff alleges the suspension was the result of false third-party
 28

complaints submitted to Google about Plaintiff's App by one or more of the Individual Defendants. *Id.* ¶¶ 63-64.

Plaintiff appealed Google's decision. *Id.* ¶ 68. Google denied the appeal and initially did not reinstate Plaintiff's developer account. *Id.* ¶ 69. After discussions with Plaintiff's representatives and after Plaintiff made changes to the app consistent with Google's policies, Google informed Plaintiff that its violation of certain aspects of Google Play's spyware policy had been addressed, but that Plaintiff's developer account could be reinstated only if Plaintiff stopped using the name SPY PHONE to identify Plaintiff's App. *Id.* ¶¶ 72-73. Google advised:

While providing additional disclosure in the app description and regular notification to targeted phones are crucial steps to accomplishing policy compliance, the Google Play Team believes the app is still in violation of policy because of the app's title. App titles should not be misleading or represent the product as being spyware and/or capable of surreptitious tracking.⁴

Id. ¶ 73.

Plaintiff agreed to change the name of its app to "Phone Tracker," and Plaintiff's account was reinstated in October 2013. *Id.* ¶¶ 76-78.

E. Plaintiff Submitted Complaints of Alleged Policy Violations

Plaintiff alleges that after its account was reinstated, the number of downloads of Plaintiff's App declined, resulting in a reduction in Plaintiff's advertising revenue through its separate website located at spyphone.com. *Id.* ¶¶ 39, 79-80. While Plaintiff alleges that "dozens and dozens" of parental monitoring and "other" apps continued to use names that contained "spy," only "several" apps contained Plaintiff's actual trademark, and Plaintiff refers to only two specific apps that included the words "spy phone" in their names. *Id.* ¶¶ 81-84. Plaintiff alleges that due to the "ease with which" Google could monitor Google Play content, Google must have known (or was willfully blind to the fact) that other developers, including the Individual Defendants, continued to use Google Play to distribute apps that infringed on Plaintiff's SPY PHONE trademark. *Id.* ¶ 86.

In or about January 2014, Plaintiff began submitting complaints about other developers' apps that contained the word "spy" in their names and competed with Plaintiff. *Id.* ¶ 89. Plaintiff admits that these

⁴ The Complaint does not attach a copy of this alleged communication.

were unlike the prior trademark complaints lodged by Plaintiff; instead, Plaintiff submitted complaints of alleged spyware policy violations that did not require that Plaintiff's identity be revealed. *Id.* ¶ 90. The DDA, however, expressly provides that Google does not undertake an obligation to monitor the content of Google Play. DDA § 7.2.

F. Google Suspended Plaintiff's Account

In early July 2014, Plaintiff's representative allegedly submitted a spyware complaint to Google concerning Individual Defendant Ciuca. Am. Compl. ¶¶ 91-92. On July 16, 2014, Google suspended Plaintiff's developer account for violation of Google's spam policy and removed Plaintiff's Phone Tracker from Google Play. *Id.* ¶ 93. Plaintiff alleges that this suspension was precipitated by complaints that Google received from Ciuca and/or other Google Play developers and that Google knew or should have known that the complaints were false or fraudulent. *Id.* ¶ 96. Plaintiff alleges that after its account was suspended, Ciuca listed an app containing the name "Spy Phone," but Plaintiff did not file any trademark complaint with Google in response. *Id.* ¶¶ 98-99.

Approximately 30 days later, Plaintiff claims to have received an anonymous letter purportedly from "a concerned member" of the Google Play team. *Id.* ¶ 103. The letter, which is not attached to the Amended Complaint, allegedly states that "there was no real justification" for either the 2013 or 2014 suspensions of Plaintiff's developer account, that those actions were intended to punish Plaintiff, and that the prohibition on the use of the word "spy" in an app name was being enforced only against Plaintiff. *Id.* ¶¶ 104-105. The anonymous letter also allegedly states that unidentified Google employees, who either developed their own apps or helped other developers with apps listed on Google Play, "had orchestrated" the removal of Plaintiff's App. *Id.* ¶ 106. Plaintiff pleads no facts to support its belief that the alleged anonymous letter in fact came from Google. Although Plaintiff alleges that Google Play continues to offer apps that infringe on Plaintiff's trademark, *id.* ¶¶ 116-20, it has not submitted any further trademark infringement complaints to Google.⁵

⁵ Plaintiff alleges that as of the date of the Amended Complaint, an app named "SpyPhone 1.0" (*id.* ¶ 120) appeared on Google Play. Plaintiff does not allege it submitted a specific trademark complaint about the app—and it did not. But Google nonetheless removed that app from Google Play on or about February 17, 2015, along with its newer version "SpyPhone 2.0" in response to the allegations in the Amended Complaint.

G. The District of New Jersey Transfers the Case to This Court

This case was initially filed in federal court in New Jersey. Google moved to transfer the case to this Court pursuant to 28 U.S.C. § 1404, or in the alternative to dismiss the second and third causes of action for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). On August 13, 2015, the New Jersey court granted the Section 1404(a) transfer, without ruling on Google's Rule 12(b)(6) motion. Opinion (ECF No. 21). In so ruling, the New Jersey Court held that Plaintiff was a party to, and subject to the provisions of, the DDA. Google hereby renews its Rule 12(b)(6) motion.

II. ARGUMENT

Plaintiff's claims against Google should be dismissed. The contributory trademark infringement claim fails to allege facts sufficient to support the claim, and the state law interference with prospective advantage claim both is barred by the Communications Decency Act and fails on the merits.

A. PLAINTIFF'S CLAIM FOR CONTRIBUTORY TRADEMARK INFRINGEMENT SHOULD BE DISMISSED

Plaintiff's claim against Google for contributory trademark infringement should be dismissed as a matter of law. Under the standard established by the Supreme Court in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 854 (1982), "if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit." While the Supreme Court's rule by its terms applies only to one who supplies a "product" to one who uses it to infringe, the Ninth Circuit has expanded the doctrine to impose liability on those who continued to supply a *service* to one known to be using it in an infringing manner, so long as the service provider is also shown to have "[d]irect control and monitoring of the instrumentality used by a third party to infringe. . . ." *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984 (9th Cir. 1999); *see generally Petroliaam Nasional Berhad v. GoDaddy.com, Inc.*, 897 F. Supp. 2d 856, 867 (N.D. Cal. 2012), *aff'd*, 737 F.3d 546 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 55 (2014) (discussing the Ninth Circuit law of contributory infringement). For example, the Ninth Circuit held that a complaint stated a claim against the operator of a marketplace where that operator had knowledge of the infringing nature of the goods being sold and nonetheless

continued to allow, support, and profit from their sale. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 265 (9th Cir. 1996). Conversely, absent inaction in the face of express notice of specific allegations of particular alleged infringements, internet marketplaces are not liable. As the Second Circuit made clear in its seminal opinion in *Tiffany (NJ) Inc. v eBay Inc.*, 600 F.3d 93, 107 (2d Cir. 2010), in the unique context of an online marketplace, “[f]or contributory trademark infringement liability to lie, a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods. Some contemporary knowledge of which particular listings are infringing or will infringe in the future *is necessary*.” (emphasis added).

The Amended Complaint pleads no facts meeting this standard. Plaintiff admits in its Amended Complaint that (i) Google in fact responded to every specific trademark complaint that Plaintiff submitted to Google and removed those apps listed in the Google Play store (with one exception discussed below, where Google could not determine if it was infringing), and (ii) Plaintiff nonetheless thereafter elected voluntarily not to use Google’s trademark complaint-reporting process to report other allegedly infringing apps. Am. Compl. ¶¶ 49, 51, 58-59, 90.

Plaintiff’s failure to provide notice to Google of the allegedly infringing apps at issue is fatal to any claim of contributory infringement. Mere generalized knowledge that some third-party content is claimed to infringe—even in cases where there have been *thousands* of notices of infringement—cannot create an obligation on the service provider’s part to search out and eliminate unreported infringements. As the Second Circuit explained in *Tiffany*, while eBay “clearly possessed general knowledge as to counterfeiting on its website,” under *Inwood Labs*, such general knowledge is insufficient to impose contributory liability on a defendant. 600 F.3d at 107 (citation omitted). Rather, consistent with *Inwood Labs*, to impose such liability it must be shown that a defendant continued to supply its services, in the case of eBay, “to one whom it knows or has reason to know is engaging in trademark infringement.” *Id.* (citation omitted). The Court held that “[f]or contributory trademark infringement liability to lie, a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods. Some contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary.” 600 F.3d at 107.

1 Significantly, the Second Circuit emphasized that Tiffany’s demand letters to eBay and other
 2 actions it took “did not identify particular sellers who Tiffany thought were then offering or would offer
 3 counterfeit goods.” 600 F.3d at 109. Where eBay did receive notice from Tiffany identifying *specific*
 4 acts of counterfeiting, eBay removed those listings. Tiffany therefore “failed to demonstrate that eBay
 5 was supplying its service to individuals who it knew or had reason to know were selling counterfeit
 6 Tiffany goods.” *Id.* See also *Peek & Cloppenburg KG v. Revue, Inc.*, No. 11 Civ. 5967 (DAB), 2012
 7 WL 4470556, at *5 (S.D.N.Y. Sept. 19, 2012) (in the context of an online service that hosts sales of
 8 allegedly infringing goods, *Tiffany* requires “a higher standard of awareness of the infringing activity” in
 9 recognition of “the difficulties that an online auction host has in ascertaining which Tiffany-branded
 10 products were authentic and which were counterfeit when Tiffany only made general allegations of
 11 counterfeiting.”) (citing *Tiffany*, 600 F.3d 105-09).

12 Although Google did not ignore any *specific* trademark complaint submitted by Plaintiff, and
 13 removed from Google Play all but a single third-party app as to which Plaintiff submitted such
 14 complaints, Plaintiff nevertheless seeks to hold Google liable for alleged infringement of which it had no
 15 specific knowledge.⁶ Plaintiff merely alleges that Google had a general right and ability to monitor and
 16 remove third-party apps from Google Play and had general knowledge that other apps being distributed
 17 through Google Play were using names that either were the same as or confusingly similar to the “Spy
 18 Phone” name.⁷ Based on these alleged facts, Plaintiff’s contributory infringement claim fails under
 19 *Inwood Labs, Lockheed Martin, and Tiffany*. Plaintiff’s admission that Google removed the apps as to
 20

21
 22 ⁶ Google did not remove an app named “Reptilicus.net Brutal Spy Phone” because, as Google advised
 23 Plaintiff, it could not determine that it was infringing. Am. Compl. ¶¶ 58-59. Indeed, this name appears
 24 to use the words “Spy Phone” merely as a descriptor and not as a trademark, as opposed to the distinctive
 25 prefix “Reptilicus.net Brutal.” See 15 U.S.C. § 1115(b)(4) (providing defense to a trademark
 26 infringement claim when “the use of the . . . term . . . charged to be infringement is a use, otherwise than
 as a mark . . . of a term . . . which is descriptive of and used fairly and in good faith only to describe the
 goods or services of such party, . . .”). The Third Circuit also has held that descriptive terms “‘describe
 a characteristic or ingredient of the article to which it refers’, . . . Courts and commentators have
 recognized the difficulties of distinguishing between suggestive, descriptive, and generic marks.” *A.J.*
Canfield Co. v. Honickman, 808 F.2d 291, 296 (3d Cir. 1986) (emphasis added).

27 ⁷ The DDA expressly provides that Google “does not undertake an obligation to monitor Products or
 28 their content” but reserves the right in its discretion to remove content based upon *notification* that
 another app “violates the intellectual property rights or any other rights of a third party.” DDA § 7.2(a)
 (emphasis added).

1 which Plaintiff provided specific notice of alleged infringement using the online complaint process is
2 fatal to its contributory trademark claim.⁸

3 The fact that Plaintiff concocts an elaborate reason for *choosing* not to use Google’s trademark
4 complaint form does not change the analysis: Whatever Plaintiff’s reasons, it affirmatively pleads a
5 deliberate choice *not* to put Google on notice. Plaintiff was clearly aware of the procedure, having used
6 it in the past and expressly pleading its provision. Plaintiff alleges its familiarity with the process, noting
7 that the instructions for using Google’s trademark complaint form provide that “[i]f an app is removed
8 from Google Play in response to a trademark complaint using Google’s online form, the developer of the
9 infringing app receives a notice from Google stating, among other things, why its app has been removed
10 from Google Play, the identity of the trademark that has been infringed and the name and email address
11 of the person who filed the infringement complaint.” Am. Compl. ¶ 50.

12 Plaintiff alleges that subsequently “dozens and dozens of other developers, including Ciuca and
13 the Doe Defendants, were permitted to list parental monitoring and other apps on Google Play containing
14 the word ‘spy’ in the name.” *Id.* ¶ 81. But Plaintiff admits that it elected voluntarily not to submit any
15 further trademark complaints and instead submitted alternative “spyware” complaints against these third
16 party developers. *Id.* ¶ 90. Plaintiff readily admits it did this to avoid having its true identity disclosed to
17 third-party developers about whom it alleged trademark infringement: “Instead of submitting trademark
18 infringement complaints against those apps, however, which could result in Google revealing Plaintiff’s
19 identity to the developer against whom the complaint was made, Plaintiff’s complaints asserted
20 violations of Google’s anti-spyware policy . . . which could be submitted without Google revealing the
21 complainant’s identity to the other developer.” *Id.* ¶ 90. Plaintiff’s spyware complaints did not reference
22 any trademark claims. Accordingly, based on the facts alleged in the Amended Complaint, as a matter of
23 law Plaintiff cannot sustain its burden of proving contributory infringement against Google, and that
24 cause of action must be dismissed.

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27 ⁸ As discussed above, the sole exception was a case in which Google determined that, based on the
28 information provided, it did not have sufficient basis to remove the app, for valid reasons communicated
to Plaintiff. *Id.* ¶ 51. Plaintiff does not allege it followed up with the requested additional information.

B. Section 230 of the Communications Decency Act Bars Plaintiff's Claim for Tortious Interference

The Communications Decency Act, 47 U.S.C. § 230 ("CDA") immunizes Google from Plaintiff's tortious interference with prospective economic advantage claim, which is grounded in Google's decisions to remove content from its online Google Play marketplace.⁹ Section 230(c)(2)(A) grants civil immunity for blocking and screening certain content and provides:

No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

47 U.S.C. § 230(c)(2)(A). Thus, to assert this prong of the CDA, a movant must qualify as a provider of an "interactive computer service"; have voluntarily blocked or filtered material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable"; and have done so in "good faith." *Holomaxx Techs. v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794, at *4 (N.D. Cal. Mar. 11, 2010) (quoting 47 U.S.C. § 230(c)(2)(A)). Google easily satisfies all three prongs of this test.

1. Google Play is an "Interactive Computer Service"

The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2).¹⁰ Google Play, an online distribution marketplace for Android apps, falls squarely within the definition. Numerous courts have held that Google Play and other Google online platforms are interactive computer services under the CDA and other federal statutes. *See, e.g., Svenson v. Google Inc.*, 65 F. Supp. 3d 717, 726 (N.D. Cal. 2014) (Google Play is an interactive computer service); *In re Google Inc. Privacy Policy Litig.*, No. C-12-01382-PSG, 2013 WL 6248499, at *12

⁹ Courts routinely recognize Section 230 immunity to bar state law claims of tortious interference with prospective economic advantage. *See, e.g., Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177-78 (9th Cir. 2009); *e360Insight, LLC v. Comcast Corp.*, 546 F. Supp. 2d 605, 609-10 (N.D. Ill. 2008); *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 452-53 (E.D.N.Y. 2004); *Holomaxx Techs. v. Yahoo!, Inc.*, No. CV-10-4926-JF, 2011 WL 865794, at *4-5 (N.D. Cal. Mar. 11, 2011).

¹⁰ Courts generally construe "interactive computer service" broadly to include various online platforms. *See Smith v. Trusted Universal Stds. in Elec. Transactions, Inc.*, No. 09-4567 (RBK/KMW), 2011 WL 900096, at *4 (D.N.J. Mar. 15, 2011); *see also Baztel v. Smith*, 333 F.3d 1018, 1030 (9th Cir. 2003); *Carafano v. Metrosplash.com Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

(N.D. Cal. Dec. 3, 2013) (same); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006), *aff'd*, 242 Fed. App'x 833 (3d Cir. 2007); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1122 (E.D. Cal. 2010); *Mmubango v. Google Inc.*, No. 12-1300, 2013 WL 664231, at *2 (E.D. Pa. Feb. 22, 2013).

2. Google Blocked Material that Is “Objectionable”

Section 230(c)(2)(A) of the CDA permits a provider of an interactive computer service to block or filter content that the provider considers to be “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable,” 47 U.S.C. § 230(c)(2)(A). Whether material is “objectionable” is consigned to the judgment of the online service provider, which need not demonstrate whether material is in fact “objectionable.” *Zango, Inc. v. Kaspersky Lab, Inc.*, No. C07-0807-JCC, 2007 WL 5189857, at *4 (W.D. Wash. Aug. 28, 2007); *see also e360Insight*, 546 F. Supp. 2d 605, 608 (N.D. Ill. 2008) (“[S]ection 230 imposes a subjective element into the determination of whether a provider or user is immune from liability.”) (citing *Zango*, 2007 WL 5189857, at *4); *Holomaxx*, 2011 WL 865794, at *5 (referring to the determination of what is objectionable as “subjective”); *Smith v. Trusted Universal Stds. in Elec. Transactions, Inc.*, No. 09-4567 (RBK/KMW), 2011 WL 900096, at *5 (D.N.J. Mar. 15, 2011).

Based on the facts alleged in the Amended Complaint, Section 230(c)(2)(A) immunizes Google from liability for its blocking decisions regarding content (apps) it deemed objectionable. *See Langdon*, 474 F. Supp. 2d at 631 (finding immunity for Google, Yahoo and Microsoft’s editorial discretion, which included screening and deleting “objectionable” content from their networks); *see also Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) (citing *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). As a matter of law, Google is not liable for suspending Plaintiff’s App from the Google Play store in response to the app’s violations of specific Google policies and Google’s own assessment of such violations, which are representative of content that Google believed to be “objectionable.” *See Green*, 318 F.3d at 472 (stating Section 230(c)(2) allows providers of interactive computer services “to establish standards of decency without risking liability for doing so.”). As alleged in the Amended Complaint, Google suspended Plaintiff’s App in response to violations of Google’s “spam” policy, which prohibits the sending of electronic messages on behalf of users without their confirmation. Am. Compl.

¶¶ 24, 93. *See Smith*, 2011 WL 900096, at *5 (“Users or providers of an interactive computer service may determine that spam is material that is harassing or otherwise objectionable under Section 230(c)(2)(A).”); *see also e360Insight*, 546 F. Supp. 2d at 607-08 (finding unsolicited and bulk-emails may be viewed as objectionable). Plaintiff’s App was also suspended due to a violation of Google’s “spyware” policy. Am. Compl. ¶¶ 23, 61. *See Zango*, 568 F.3d at 1174 (analogous malware, which can retrieve personal information, is objectionable).

These actions were taken to remove “objectionable” material from the Google Play marketplace, whether based on third-party complaints or Google’s own initiative. Even if Google did err as to whether Plaintiff’s App was indeed objectionable under Google’s policies, as Plaintiff alleges, immunity still attaches. *See e360Insight*, 546 F. Supp. 2d at 609 (“To force a provider . . . to litigate the question of whether what it blocked was or was not spam would render § 230(c)(2) nearly meaningless”); *see also Langdon*, 474 F. Supp. 2d at 630-31 (granting section 230(c)(2) immunity where Plaintiff argued defendants created “purported reasons for not running his ads.”).

3. Google Acted in Good Faith

To determine whether an interactive computer service blocked or filtered content in “good faith,” courts look to the pleadings, and place the burden on the plaintiff to plead an absence of good faith. *See Holomaxx*, 2011 WL 865794, at *5 (“[T]he appropriate question is whether [plaintiff] has pled an absence of good faith.”) (citing *e360Insight*, 546 F. Supp. 2d at 609) (internal quotation marks omitted); *see also, e.g., Smith*, 2011 WL 900096, at *8.¹¹ Plaintiff fails to plead any specific facts to support any bad faith action by Google, and thus fails to overcome CDA immunity. Google (although it was under no obligation to do so) was forthcoming with “objectionable” conduct explanations for suspending Plaintiff’s App from Google Play and requiring Plaintiff change the name of its app. *Cf. Smith*, 2011 WL 900096, at *8-9 (finding bad faith where an ISP ignored repeated requests for an explanation why it blocked plaintiff’s outgoing mail). Plaintiff admits that Google notified it of the reasons for removal of its app from Google Play. Am. Compl. ¶¶ 61, 93. Moreover, Plaintiff’s unsubstantiated assertion that

¹¹ Similarly, at least one court has made clear that a provider of an interactive computer service is under no obligation to offer reasons for blocking or filtering content. *See, e.g., id.* (finding allegations that Yahoo! refused to discuss its reasoning for filtering content insufficient to plead an absence of good faith).

Google's policies were only enforced against Plaintiff and not other apps on Google Play does not justify an inference of bad faith. *See e360Insight*, 546 F. Supp. 2d at 609 (granting immunity where plaintiff claimed he was being "singl[ed] out" because the defendant ISP allowed other companies to send bulk emails) (citation omitted). The CDA immunizes an ISP's enforcement of its community standards regardless whether the Plaintiff (or anyone else) thinks that enforcement has been evenhanded. Accordingly, Section 230(c)(2)(A) of the CDA requires dismissal of Plaintiff's tortious interference with prospective economic advantage claim.

C. Plaintiff has Failed to State a Tortious Interference Claim

Even if the CDA did not bar the claim, Plaintiff's claim of tortious interference with prospective economic advantage fails as a matter of law. The elements of that claim are well-settled under both California and New Jersey law: (1) the plaintiff must have a protectable right giving rise to a reasonable expectation of economic advantage, (2) the defendant must have been aware of the prospective economic advantage, (3) the defendant must have interfered intentionally and with malice, (4) there must be a reasonable probability that the plaintiff would have received the anticipated economic benefits, but for the defendant's interference, and (5) resulting damage. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1154 (2003) (citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 11 Cal 4th. 376, 378 (1995)) (listing elements of claim); *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 751-52 (N.J. 1989); *see also Wexco Indus. v. ADM21 Co.*, No. 04-5244 (JLL), 2008 WL 5427867, at *7 (D.N.J. Dec. 30, 2008); *Coast Cities Truck Sales, Inc. v. Navistar Int'l Transp. Co.*, 912 F. Supp. 747, 771 (D.N.J. 1995).

In addition, in order to plead a claim for tortious interference, "a plaintiff must plead that the defendant engaged in an act that is wrongful apart from the interference itself." *Korea Supply*, 29 Cal. 4th 1158-9 ("The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their . . . commercial relationships or their pursuit of commercial objectives, [A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.") (citing *Della Penna*, 11 Cal. 4th at 393). Where, as here, Google is contractually authorized to exercise the editorial judgment and policing of its own website, there is no independent wrong on

1 which to rest an interference claim. When the defendant is contractually privileged to commit the alleged
 2 act, no claim for interference will lie. *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal. App. 3d 13, 17-18
 3 (1978).

4 The law is the same in New Jersey, where in order to establish the required “malice” the alleged
 5 harm must have been inflicted intentionally and without justifiable excuse. *Printing Mart*, 116 N.J. at
 6 751.¹² The test is whether the defendant “had the right to perform the act or set of actions that gave rise
 7 to the lawsuit.” *Wexco*, 2008 WL 5427867, at *8. “Tort liability for interference with prospective
 8 economic benefit arises when the conduct of the defendant is not in the reasonable exercise of an equal or
 9 superior right.” *Id.* (citation omitted). “[O]ur courts have concluded that ‘violence, fraud, intimidation,
 10 misrepresentation, criminal or civil threats, and/or violations of the law’ are among the kinds of conduct
 11 that would be considered to be ‘wrongful means.’” *Nostrame v. Santiago*, 213 N.J. 109, 124 (N.J. 2013)
 12 (quoting *E Z Sockets, Inc. v. Brighton–Best Socket Screw Mfg. Inc.*, 704 A.2d 1364, 1370 (N.J. Super. Ct.
 13 Ch. Div. 1996), *aff’d*, 704 A.2d 1309 (N.J. Super. Ct. App. Div. 1997).

14 Here, Google did nothing more than exercise its contractual rights under the DDA—“superior”
 15 rights that cannot be the basis of a finding of malicious or tortious conduct. *Wexco*, 2008 WL 5427867,
 16 at *8. Under the express terms of the DDA, Google, in “its sole discretion,” is authorized to take down
 17 any app that Google has deemed to be spyware. DDA § 7.2(f). Such spyware is also prohibited by
 18 Google’s Developer Program Policies, which are incorporated into the DDA. DDA § 4.11; Am. Compl.
 19 ¶¶ 20-21. Plaintiff’s conclusory allegation that Google “knew that there was no real justification for
 20 either the removal of Plaintiff’s App from Google Play or the termination of its developer account” is
 21 irrelevant. Am. Compl. ¶ 65. Google’s actions were expressly privileged under the parties’ contract and
 22 thus, as a matter of law, any tortious interference claim fails. For the same reason, Plaintiff’s conclusory
 23 assertion that Google acted in “bad faith” is nothing more than “a formulaic recitation of the element[] of
 24 a cause of action” that does not meet the pleading standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S.
 25 544, 555 (2007).

26
 27
 28 ¹² Notably, Plaintiff only alleges that the Individual Defendants, not Google, acted “intentionally and
 without justification or excuse.” Am. Compl. ¶¶ 146-47.

1 Similarly, Google’s alleged failure to remove allegedly infringing apps or to suspend other
 2 developers’ accounts is completely within Google’s “sole discretion” under the DDA. DDA § 7.2(f). As
 3 a matter of law, Google could not have acted intentionally and with malice simply by exercising that
 4 express contractual right. Additionally, the DDA expressly provides that a violation of its terms (and the
 5 spyware and other policies incorporated by reference therein) is a ground for Google to terminate its
 6 contract with Plaintiff. DDA § 10.3(A). Thus, Google’s termination and subsequent suspension of
 7 Plaintiff’s account also were completely within Google’s rights under the DDA. Google’s exercise of its
 8 contractual rights is not “independently wrongful conduct” and cannot support Plaintiff’s claim of
 9 tortious interference.

10 Nor has Plaintiff pled any recoverable damages on this claim. Plaintiff alleges that the
 11 “prospective customers” with whom Google allegedly interfered are the prospective customers who
 12 would have downloaded its app from Google Play. Am. Compl. ¶¶ 145-46. But the Amended
 13 Complaint also alleges that those prospective customers would have downloaded Plaintiff’s app for free.
 14 *Id.* ¶ 37. Plaintiff thus seeks only consequential lost profits damages. The connection of those claimed
 15 damages to Google’s allegedly “wrongful” conduct is tenuous at best. But putting aside the tenuous
 16 logic of this chain, the DDA expressly *precludes* any recovery for precisely this sort of consequential and
 17 lost profits damages. DDA § 12. Particularly here, where Google Play is a free service and Plaintiff’s
 18 App was a free download, such contractual limitations on consequential losses and lost profits are
 19 regularly enforced by courts in both New Jersey and California. *See Nat’l Rural Telecomms. Coop. v.*
 20 *DIRECTV, Inc.*, 319 F. Supp. 2d 1040, 1055 (C.D. Cal. 2003) (allowing TV service provider to invoke
 21 against distributor limitations clause that barred recovery of lost profits); *Hebert v. Rapid Payroll, Inc.*,
 22 No. CV 02-4144 DT (PJXw), 2005 WL 6172659, at *7 (C.D. Cal. Feb. 9, 2005) (limitation of damages
 23 provision in license agreement is not unconscionable and bars plaintiff’s recovery of lost profits as a
 24 matter of law); *Strassle v. Bimbo Foods Bakeries Distrib., Inc.*, No. 12-3313 (RBK/AMD), 2013 WL
 25 1007289, at *5 (D.N.J. Mar. 13, 2013) (enforcing damages limitation clause in distribution agreement
 26 barring recovery of “consequential, incidental, indirect or special damages, including lost profits and
 27 punitive damages[.]” and finding that waiver is not unconscionable).

1 As a matter of both California and New Jersey law, therefore, Count III of the Amended
2 Complaint fails to state a claim.

3 **III. CONCLUSION**

4 Google respectfully requests that Counts II and III of the Amended Complaint be dismissed, with
5 prejudice and with costs awarded to Google.

6
7 Dated: October 2, 2015

DURIE TANGRI LLP

8
9 By: /s/ Michael H. Page
MICHAEL H. PAGE

10 Attorneys for Defendant
11 GOOGLE INC.
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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2015 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Michael H. Page
MICHAEL H. PAGE